Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

The State of New Mexico Energy, Minerals and Natural Resources Department, The Commissioner for Public Lands for the State of New Mexico, Pacific Gas and Electric Company, and Southern California Gas Company,

Petitioners,

v.

Federal Energy Regulatory Commission,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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May 20, 1997

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QUESTION PRESENTED

Where Congress and Supreme Court precedent have declared that natural gas gathering services performed by an interstate pipeline system are subject to rate regulation by the Federal Energy Regulatory Commission under Sections 4 and 5 of the Natural Gas Act, does *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), compel affirmance of Federal Energy Regulatory Commission Orders that deregulate gathering services performed by a wholly-owned pipeline subsidiary and administratively devolve regulatory responsibility over such gathering services to the states?

PARTIES TO THE PROCEEDING

Pursuant to Rules 14.1(b) and 29.6 of the Rules of the Supreme Court of the United States, S. Ct. R. 14 & 29, Petitioners state as follows:

Pacific Gas and Electric Company

Pacific Gas and Electric Company ("PG&E") is a corporation organized under the laws of the State of California. The parent company of PG&E is PG&E Corporation. PG&E has no nonwholly owned subsidiaries.

Southern California Gas Company

Southern California Gas Company ("SoCalGas") is a corporation organized under the laws of the State of California. The parent company of SoCalGas is Pacific Enterprises. SoCalGas does not have any nonwholly owned subsidiaries.

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IN THE
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OCTOBER TERM, 1996

The State of New Mexico Energy, Minerals and Natural Resources Department, The Commissioner for Public Lands for the State of New Mexico, Pacific Gas and Electric Company, and Southern California Gas Company,
Petitioners,

v.

Federal Energy Regulatory Commission,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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The State of New Mexico Energy, Minerals and Natural Resources Department, The Commissioner for Public Lands for the State of New Mexico, Pacific Gas and Electric Company, and Southern California Gas Company, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at *Pacific Gas & Elec. Co. v. Federal Energy Regulatory Comm'n*, 106 F.3d 1190 (5th Cir. 1997). The opinions of the Federal Energy Regulatory Commission ("Commission" or "FERC") are reported at *El Paso Natural Gas Co.*, 72 F.E.R.C. (CCH) ¶ 61,220 (1995) (App. B) and *El Paso Natural Gas Co.*, 73 F.E.R.C. (CCH) ¶ 61,224 (1995) (App. C).

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on February 19, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1996) and 15 U.S.C. § 717r(b) (1996).

STATUTORY PROVISIONS INVOLVED

In part, Section 4 of the Natural Gas Act ("NGA") provides that:

> (a) Just and reasonable rates and charges
>
> All rates and charges made, demanded, or received by any natural-gas company for or *in connection with* the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

> (c) Filing of rates and charges with Commission; public inspection of schedules
>
> [E]very natural-gas company shall file with the Commission . . . schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission . . . .

15 U.S.C. § 717c(a) & (c) (emphasis added) (App. E at E-1-E-2).

Section 5 of the NGA requires the Commission, upon its own motion or in response to a complaint, to determine the reasonableness of:

> any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company *in connection with* any transportation or sale of natural gas . . . .

15 U.S.C. § 717d(a) (emphasis added) (App. F at F-1).

STATEMENT OF THE CASE

A. Interests Of The Parties.

As a natural gas company subject to the NGA, 15 U.S.C. §§ 717-717w, El Paso Natural Gas Company ("El Paso") operates an extensive interstate pipeline system which consists of large, high pressure transmission lines. At its various delivery points, the El Paso system serves various municipalities, local distribution companies, and commercial and industrial customers located in the states of Texas, New Mexico, Arizona, Nevada, and California.

Prior to the FERC Orders below, El Paso also owned and operated extensive field or gathering systems[1] located in three natural gas producing areas, *i.e.*, the San Juan, Permian, and Anadarko Basins. 72 F.E.R.C. at 62,003 (App. B at B-2). Pursuant to the Orders below, El Paso was permitted to abandon these gathering facilities by transfer to an affiliate, El Paso Field Services Company ("Field Services"), via a corporate spin-down. *Id.* (App. B at B-1). Thereupon, under its "new" gathering policy, *see infra* note 4, the Commission ceased to exercise jurisdiction over the gathering functions performed by Field Services. The Commission deregulated Field Services even though several intervenors argued that Field Services enjoys significant market power over gathering services in the natural gas producing areas in which it operates. *Id.* at 62,013 (App. B at B-32–B-33).

Much of the gas that flows over the Field Services gathering system and into the El Paso interstate pipeline system (collectively the "El Paso system") is produced and gathered in the State of New Mexico.[2] The New Mexico Energy, Minerals and Natural Resources Department has regulatory authority over natural gas drilling and production in the State of New Mexico, and the Commissioner for Public Lands for the State is the elected officer charged with the duty of maximizing revenues from the State of New Mexico trust lands. Petitioners

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[1] "Gathering" is "the process of collecting gas at the point of production (the wellhead) and moving it to a collection point for further movement through a pipeline's principal transmission system. It should be pointed out . . . that the flow of the gas 'is continuous from the well head to the ultimate consumer.'" *Northern Natural Gas Co. v. FERC*, 929 F.2d 1261, 1265 (8th Cir.), *cert. denied*, 502 U.S. 856 (1991) (citations omitted).

[2] Two of the three producing basins that produce gas into the El Paso system, the San Juan Basin and the Permian Basin, are located largely, but not exclusively, within the State of New Mexico.

PG&E and SoCalGas are local distribution companies that purchase and distribute natural gas transported on the El Paso system, ultimately serving many millions of people in California, including many commercial and industrial customers.[3]

The petitioners collectively represent a wide range of interests on the El Paso system. The State of New Mexico has an interest in protecting its citizens from monopoly and discriminatory charges exacted at the gathering stage and borne by natural gas producers in New Mexico or passed on, through fixed items of cost, to gas consumers in New Mexico. PG&E and SoCalGas share the latter concern, desiring to protect millions of California consumers from unreasonably high gas costs exacted at the gathering stage and perpetuated in the interstate movement of gas from New Mexico production areas for consumption in California. As this Court previously held in a directly applicable case involving the interstate movement of gas to consuming states and the perpetuation of gathering charges exacted by a pipeline affiliate in a production state, "[i]t was to avoid such situations that the Natural Gas Act was passed." *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682, 693 (1947).

Furthermore, New Mexico has a fundamental interest in avoiding the significant expense of enacting and imposing a legislative and regulatory structure appropriate to constrain Field Services' market power in New Mexico's natural gas producing basins. Under its new gathering policy, the FERC

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[3] PG&E distributes natural gas and electricity throughout northern and central California, serving 3.7 million customers (including over 200,000 commercial and industrial customers) in a service area having a population of approximately 11 million people. SoCalGas distributes and transports natural gas in central and southern California, serving 4.8 million customers in an area with a population of 15 million people.

has declared that "any regulation of [pipeline gathering affiliates] is a matter for the appropriate state agency." *Arkla Gathering Servs. Co.*, 70 F.E.R.C. (CCH) ¶ 61,079 at 61,219 (1995). *See also infra*, note 5 and Appendix H. However, any decision to deregulate pipeline gathering affiliates under the NGA and to devolve or delegate regulatory responsibility to the natural gas producing states is a matter for Congress, not the FERC. The Commission's desire to rely on natural gas producing states to fulfill the national consumer protection directives of the NGA constitutes an "impermissible delegation of the federal agency's authority and responsibility." *Sierra Club v. United States Army Corps of Engineers*, 701 F. 2d 1011, 1038 (2d Cir. 1983) (Federal agencies violate NEPA by relying on state agencies with local interests to prepare environmental impact studies that must be based on an objective evaluation of federal interests).

B. The El Paso Orders Before The Federal Energy Regulatory Commission.

On January 14, 1994, pursuant to Section 7(b) of the NGA, 15 U.S.C. § 717f(b), and 18 C.F.R. §§ 157.5-157.21, El Paso filed with the Commission a request for authority to abandon by transfer to Field Services all of El Paso's gathering system facilities that were subject to certificates of public convenience and necessity. 72 F.E.R.C. at 62,003 (App. B at B-1). El Paso stated that it intended to transfer all of its gathering, treating, and processing facilities that had previously been subject to regulation by the Commission to its wholly-owned subsidiary, Field Services. *Id.*

The Commission issued the Abandonment Order on September 13, 1995. *Id.* at 62,019-20 (App. B at B-51-B-53). In that Order, subject to certain conditions and modifications, the Commission granted El Paso's request for abandonment

authority of its gathering facilities. *Id.* at 62,014, 62,020 (App. B at B-35, B-51-B-52). The Commission recognized that the gathering facilities at issue were "facilities used for the transportation and sale of natural gas in interstate commerce subject to the Commission's jurisdiction, [such that] the proposed abandonment is subject to the requirements of NGA section 7(b)." *Id.* at 62,008 (App. B at B-17).

In the Abandonment Order, the Commission denied all protests and requests for hearing. *Id.* at 62,020 (App. B at B-52). In particular, the Commission denied requests to determine the level of competition for gathering services in El Paso's production areas before determining whether El Paso's requested abandonment served the public interest. *Id.* at 62,013 (App. B at B-33). The Commission explained that "the existence or absence of competition for gathering in an area is irrelevant to whether or not the Commission will regulate an affiliated gatherer's rates." *Id.* at 62,013-14 (App. B at B-33). Applying a newly announced change in the Commission's gathering policy,[4] by the formality of approving a transfer of El

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[4] In *Northern Natural*, 929 F.2d at 1263 n.2, the court determined that the Commission had jurisdiction over gathering facilities owned by an interstate pipeline, including facilities owned by a pipeline affiliate. In *Northwest Pipeline Corp.*, 59 F.E.R.C. (CCH) ¶ 61,115 (1992), the Commission cited *Northern Natural* as establishing that "the Commission's authority to exert NGA section[s] 4 and 5 jurisdiction over gathering facilities . . . would extend in *like manner* to an interstate pipeline's parent, affiliate, subsidiary, or lessor." *Id.* at 61,435 (emphasis added). Since *Northern Natural*, however, as recently described by a commentator, "[t]he Commission began allowing pipelines to transfer almost any system to an affiliate and treat it as unregulated." *See* John Burrit McArthur, *Anti-trust in the New [De]Regulated Natural Gas Industry*, 18 Energy L. J. 1, 25 (1997). To "everyone's surprise . . . and to pipelines' delight," the Commission announced that "'the existence of competition is not particularly relevant to a decision to allow a pipeline to abandon its gathering facilities.'" *Id.* at 26 (quoting *Mid Louisiana Gas Co.*, 67 F.E.R.C. (CCH) ¶ 61,255 at 61,851

Paso's gathering facilities to a wholly owned affiliate, the Commission "turn[ed] a heavily regulated gathering facility into a facility that is outside of FERC jurisdiction." *Pacific Gas*, 106 F. 3d at 1196 (App. A at A-11).

Several parties, including petitioners, filed timely requests for rehearing of the Commission's Abandonment Order. *See* 73 F.E.R.C. at 61,639 (App. C at C-1-C-2). On November 29, 1995, the Commission issued the Rehearing Order, denying the requests for rehearing. *Id.* The Commission again asserted that it would not exercise jurisdiction over Field Services after abandonment and again refused to consider whether competition in the relevant gathering areas was sufficient to supplant the need for active regulation by the Commission. *Id.* at 61,641 (App. C at C-8).

Petitioners PG&E and SoCalGas filed timely Petitions for Review of the Abandonment and Rehearing Orders on January 21, 1996. The New Mexico petitioners filed a timely Petition for Review of the Orders on January 25, 1996. On April 10, 1996, the Fifth Circuit consolidated the two petitions.

C. *The Decision Of The Court Of Appeals For The Fifth Circuit.*

The jurisdiction of the Court of Appeals for the Fifth Circuit was properly invoked under 15 U.S.C. § 717r(b). On

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(1994)). As described by the Commission: "Generally, under the new [gathering and abandonment] policy, absent collusion between an interstate pipeline and its affiliate resulting in undue discrimination, the Commission does not have jurisdiction over interstate pipeline affiliated companies that perform only a gathering function." *Sea Robin Pipeline Co.*, 75 F.E.R.C. (CCH) ¶ 61,332 at 62,071 n.2 (1996).

February 19, 1997, in *Pacific Gas*, 106 F.3d at 1193 (App. A at A-3), the court affirmed the Commission Orders.

In reaching its decision, the Fifth Circuit determined not to follow the Eighth Circuit's opinion in *Northern Natural*, 929 F.2d 1261. In *Northern Natural*, the court concluded that the exercise of the Commission's "[j]urisdiction over rates for gathering, when performed by an interstate pipeline over its own facilities in connection with jurisdictional interstate transportation, *is* necessary to preserve the Commission's §§ 4 and 5 responsibility to prevent discrimination against shippers who must depend on monopolistic pipelines for transportation." *Id.* at 1273. The *Northern Natural* court expressly defined "'gathering facilities owned by the pipeline'" to include gathering facilities that were affiliated with a jurisdictional pipeline. *Id.* at 1263 n.2 (citation omitted).

Rather than follow *Northern Natural*, the Fifth Circuit instead chose to follow the opinion of the D.C. Circuit in *Conoco, Inc. v. FERC*, 90 F.3d 536 (D.C. Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 1017 (1997). In *Conoco*, a case that also involved the Commission's new gathering policy, the court characterized *Northern Natural*'s inclusion of gathering services performed by pipeline affiliates as within the reach of the Commission's NGA jurisdiction as "dictum." *Id.* at 546.

Although it affirmed the Commissioner's Orders on review, the Fifth Circuit agreed that "[t]here is room to question whether the formality of creating a separate corporate entity justifies turning a heavily regulated gathering facility into a facility that is outside of FERC jurisdiction." *Pacific Gas*, 106 F.3d at 1196 (App. A at A-11). The court recognized the "legitimate concern that FERC's reading gives little assurance that affiliated gatherers will in fact act independently of the pipelines that own them." *Id.*

The Fifth Circuit further acknowledged the concern that the Commission had failed to consider the sufficiency of competition in deregulating Field Services, *id.* at 1197 (App. A at A-12), and noted "[i]t is likely that Field Services will charge a higher price than it would have under FERC regulation," *id.* at 1195 (App. A at A-9). The court described the Commission's action as the deregulation of "a major portion of a distributor's supply structure," with resultant "threat to the distributor's economic security." *Id.*

In light of the recognized concerns that attend the Commission's deregulation of Field Services under the NGA, the Fifth Circuit also acknowledged the particular concern stressed by the State of New Mexico. Specifically, the court recognized the State of New Mexico's interest in "avoiding the expense of imposing [its] own regulation of natural gas to compensate for FERC's decision to bow out of the regulation of gatherers affiliated with interstate pipelines." *Id.* at 1194 (App. A at A-5).

Notwithstanding the court's apparent appreciation of the concerns raised by the FERC's deregulation of pipeline-affiliated gathering companies, the Fifth Circuit, with little substantive explanation, held that the Commission's interpretation of the NGA was "permissible" under *Chevron*. *Id.* at 1196-97 (App. A at A-12) (referring to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)).

REASONS FOR GRANTING THE PETITION

Rule 10 of the Rules of the Supreme Court of the United States sets forth the considerations of this Court in determining whether to grant certiorari, indicating the propriety of review where:

> a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . .

or

> a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10. Each of these grounds for granting certiorari is presented here.

A. The United States Courts Of Appeals Disagree On An Important Interpretation Of The Natural Gas Act.

The opinion by the Fifth Circuit highlights the disagreement among the United States courts of appeals as to the proper construction of the Natural Gas Act and the Commission's jurisdictional responsibilities over gathering services performed by a corporate affiliate of an interstate pipeline. Under the Eighth Circuit's *Northern Natural* decision, gathering services performed by a corporate affiliate of an interstate pipeline would be subject to the FERC's regulatory jurisdiction under Sections 4 and 5 of the NGA to the same

extent as gathering services performed by the parent interstate pipeline. 929 F.2d at 1263 n.2, 1273. Under the D.C. Circuit's *Conoco* decision and the Fifth Circuit's *Pacific Gas* decision, the pipeline system can escape such regulation by the simple device of a corporate spin-down of gathering facilities from the interstate pipeline to an affiliate. 90 F.3d at 546; 106 F.3d at 1193 (App. A at A-3). Under the *Conoco* and *Pacific Gas* decisions, but contrary to *Northern Natural*, the Commission is allowed to delegate or devolve regulatory responsibility over gatherers affiliated with interstate pipelines to the natural gas producing states. *See, e.g., Arkla Gathering Servs. Co.*, 70 F.E.R.C. (CCH) ¶ 61,079 at 61,219 (1995) (Regulation of pipeline affiliated gathering services "is a matter for the appropriate state agency.").[5]

The aid of this Court is needed to resolve the scope of the FERC's jurisdictional responsibility under the NGA and the lawfulness of the FERC's effort to delegate or devolve regulatory responsibility over pipeline affiliated gatherers to natural gas producing states such as New Mexico.

B. Contrary To Relevant Decisions Of This Court, The Fifth Circuit Decision Applies Chevron *As Permitting Deregulation Of Statutory Matters By An Administrative Agency.*

The *Conoco* and *Pacific Gas* decisions also illustrate difficulty with respect to the correct application of the *Chevron*

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[5] It is clear that the Commission desires the producing states to assume the responsibility of regulating gathering services performed by a corporate affiliate of an interstate pipeline. *See* Appendix H for excerpts from the Commission's discussion of issues remanded by the D.C. Circuit in *Conoco*. In the words of Commissioner Massey, "[t]he states need to step up to the plate and take a close look at their regulatory policies with respect to gathering."

doctrine. *Chevron, U.S.A., Inc. v. Natural Resources Defense*, 467 U.S. 837 (1984). *Conoco* and *Pacific Gas* apply *Chevron* as compelling affirmance of FERC's deregulation of pipeline gathering affiliates from Sections 4 and 5 of the NGA, even in the face of the serious concerns clearly recognized by the Fifth Circuit.[6] As relevant decisions of this Court make clear, *Chevron* deference to an administrative body does not allow the agency to deregulate an area that the statutory scheme, as interpreted by this Court, places within the agency's regulatory jurisdiction. *See MCI Telecomm. Corp. v. American Tel. & Tel. Co.*, 521 U.S. 218, 114 S. Ct. 2223, 2231 (1994); *Maislin Indus., U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). Even if the statutory scheme is unclear, *Chevron* should not be applied to require a reviewing court to affirm an agency order in the absence of a satisfactory explanation as to whether the order "is reasonable in light of the legislature's revealed design . . . . " *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, __ U.S. __, 115 S. Ct. 810, 813-14 (1995). *See also Athens Community Hosp., Inc. v. Shalala*, 21 F.3d 1176, 1179 (D.C. Cir. 1994).

Though the *Chevron* doctrine has been heralded as the "most important" Supreme Court decision to address review of administrative actions,[7] the lower courts continue to grapple with using the *Chevron* two-step analysis.[8] This case further demonstrates the need for clarification of the *Chevron* analysis and provides the Court with that opportunity.

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[6] *See* Statement of the Case, Part C, *supra*.

[7] Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2074 (1990).

[8] *See* Sunstein, 90 Colum. L. Rev. at 2075 ("The [*Chevron*] case raises at least as many questions as it answers.").

1. The Fifth Circuit erred in upholding Commission Orders that conflict with the Natural Gas Act, as previously construed by this Court.

Under *Chevron*'s first step ("Step One"), the reviewing court and agency "must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 843. The Court explained that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 842-43 n.9. Of critical importance in this case, *Chevron* Step One requires that an agency's construction of a statute must be judged against prior judicial determinations of the statute's meaning. *See Maislin*, 497 U.S. at 131.

The Commission's decision to deregulate gathering functions performed by wholly owned affiliates of interstate pipelines does not comport with the NGA as previously construed by this Court. As thoroughly discussed by the Eighth Circuit in *Northern Natural*, the regulation of gathering services performed by affiliates of interstate pipelines involves the "nexus between the § 1(b) exclusion of gathering [under the NGA] and the §§ 4 and 5 authority to regulate services *in connection with* jurisdictional transportation," 929 F.2d at 1272 (emphasis added); *see* 15 U.S.C. § 717(b) (App. D). This Court has clearly defined this nexus, establishing that, to avoid compromising the purposes of the NGA, the "[e]xceptions to the primary grant of jurisdiction in . . . section [1(b)] are to be strictly construed." *Interstate Natural*, 331 U.S. at 690-91. Accordingly, the Section 1(b) gathering exemption is strictly limited to local conservation matters, *e.g.*, "the drilling and spacing of wells and the like." *Colorado Interstate Gas Co., v. FPC*, 324 U.S. 581, 603 (1945). *See also Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 90-91 (1963)

(The Section 1(b) gathering exemption is limited to "the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution.").

Colorado Interstate and *Interstate Natural*, as well as the ordinary meaning of the statutory phrase "in connection with,"[9] further establish that gathering charges exacted by corporate affiliates of interstate pipelines are rates charged "in connection with" jurisdictional interstate transportation or sales by the interstate pipeline and therefore subject to Sections 4 and 5 of the NGA. The Court's holdings in each of *Colorado Interstate* and *Interstate Natural* involved gathering services performed by affiliates of an interstate pipeline.[10] In both cases, this Court found that the Commission's jurisdiction under Sections 4 and 5 of the NGA encompasses gathering charges exacted by a gathering affiliate of an interstate pipeline.

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[9] Nontechnical phrases that are not defined by statute are given their ordinary meaning. *Smith v. United States*, 508 U.S. 223, 228 (1993). The physical connection of pipeline or pipeline affiliated gathering to pipeline interstate transportation clearly meets the dictionary meaning of "in connection with." "'Connection' means '[a]n association, alliance, or relation.'" *Huntsman v. Commissioner*, 905 F.2d 1182, 1184 n.5 (8th Cir. 1990) (quoting the American Heritage Dictionary at 282 (1976)). *See also Northern Natural*, 929 F.2d at 1265 (in explaining the process of gathering, noting that "[i]t should be pointed out . . . that the flow of the gas 'is continuous from the well head to the ultimate consumer.'") (citation omitted). In the situation before the Court, gas flows directly from wells in New Mexico's production areas into El Paso Field Services' gathering system before receipt into El Paso's interstate pipeline. 72 F.E.R.C. at 62,005-06 (App. B at B-6—B-9).

[10] In *Colorado Interstate*, Colorado Interstate was an interstate pipeline and Canadian, its affiliate, was the corporate entity that operated the gathering services at issue. *See* 324 U.S. at 385. In *Interstate Natural*, a seller produced and gathered gas before selling it to three different pipelines, one of which was affiliated with the seller. 331 U.S. at 682.

Colorado Interstate, 324 U.S. at 604;[11] *Interstate Natural*, 331 U.S. at 693.

Chevron does not permit the FERC to rewrite the Supreme Court's well-defined jurisdictional boundaries between Section 1(b) and Sections 4 and 5 of the NGA in order to deregulate gathering functions undertaken by affiliates of interstate pipelines. As set forth in *MCI Telecomm.*, __ U.S. __, 114 S. Ct. at 2233, and *Maislin*, 487 U.S. at 134-35, cases that involved regulatory schemes analogous to the NGA, an agency may not exempt entities from statutory rate requirements.[12] Under these directly applicable precedents, any

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[11] In *Colorado Interstate*, this Court ruled that the existence of alleged "arms length" negotiations, where the corporate parents of nominally distinct gathering and pipeline entities operated as part of a "single enterprise," 324 U.S. at 585, was of no importance where the result would be increased costs visited on the public, *id.* at 608.

[12] In *MCI Telecomm.*, this Court addressed the Federal Communications Commission's ("FCC") authority to "'modify any requirement made by or under the authority of'" Section 203 of the Communications Act. __ U.S. __, 114 S. Ct. at 2228 (quoting 47 U.S.C. § 203 (1988 ed. & Supp. IV)). In rejecting the FCC's attempt to make tariff filings optional, the Court stated, "[f]or better or worse, the Act establishes a rate-regulation, filed-tariff system for common-carrier communications, and the Commission's desire 'to "increase competition" cannot provide [it] authority to alter the well-established statutory filed rate requirements.' As we observed in the context of a dispute over the filed-rate doctrine more than 80 years ago, 'such considerations address themselves to Congress, not to the courts.'" *Id.* at 2233 (citations omitted). The Court emphasized that "[r]ate filings are, in fact, the essential characteristic of a rate-regulated industry." *Id.* at 2232.

In *Maislin*, the Court held the Interstate Commerce Commission's *Negotiated Rates* policy to be inconsistent with the Interstate Commerce Act. 497 U.S. at 117-18. The Court stated that, "[a]lthough the [Interstate Commerce] Commission has both the authority and the expertise generally to adopt new policies when faced with new developments in the industry, . . . [it

decision to deregulate or exempt pipeline gathering affiliates from Sections 4 and 5 of the NGA must be made by Congress, not by the Commission. *See also FPC v. Texaco Inc.*, 417 U.S. 380, 394 (1974) ("The Commission may have great discretion as to how to insure just and reasonable rates, but it is plain enough to us that the [Natural Gas] Act does not empower it to exempt small-producer rates from compliance with that standard.").

2. *The Court of Appeals erred in finding the Commission's construction of the NGA permissible under* Chevron.

As noted above, the Fifth Circuit erroneously failed to consider that the statutory language of Sections 4 and 5 of the NGA, as interpreted by *Colorado Interstate* and *Interstate Natural*, unambiguously encompasses gathering functions performed by a gathering affiliate of an interstate pipeline. For this reason, the Court wrongly considered this case as falling under *Chevron* Step Two, such that the Commission's statutory construction must be affirmed if it is "reasonable."

The Fifth Circuit's failure to judge the FERC's construction of the NGA against the Supreme Court's holdings in *Colorado Interstate* and *Interstate Natural* is crucial, because reaching *Chevron* Step Two has, as this case demonstrates, become nearly synonymous with automatic deferral to the agency.[13] However, reaching the second step of *Chevron* does

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does not have the power to adopt a] policy that directly conflicts with its governing statute."

[13] *See* Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 Tex. L. Rev. 83, 84 (1994) ("At [*Chevron*'s] step two, few courts have applied

not mean that it is appropriate to rubber stamp any agency construction of an unclear statutory provision. Under *Chevron* Step Two, the reasonableness of the agency's interpretation depends on whether the agency's reading fills a statutory gap or defines a statutory term in a way that is reasonable "in light of the legislature's revealed design." *NationsBank of North Carolina*, __ U.S. __, 115 S. Ct. at 813-14. Even under a narrow *Chevron* Step Two review, an agency decision must be overturned if the agency has failed to articulate a satisfactory explanation of its action. *Athens Community Hosp.*, 21 F.3d at 1179. The agency's explanation must consider "factors deemed relevant by the Act." *National Ass'n of Regulatory Util. Comm'rs. v. ICC*, 41 F.3d 721, 727 (D.C. Cir. 1994) (citation omitted).

The FERC Orders at issue do not give satisfactory consideration to the legislative design of the NGA or factors relevant to the NGA. The legislative design of the NGA frequently has been defined as the protection of the public against the exercise of monopoly power by interstate pipeline systems. *See FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944); *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 985 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). As explicitly addressed by this Court in *Interstate Natural*, the legislative design or purpose of the NGA includes the protection of consumers against unreasonable gathering charges exacted in the production areas by a pipeline gathering affiliate and passed

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exacting scrutiny in assessing the reasonableness of an agency interpretation.").

on to subsequent interstate consumers of the gas by monopolist pipelines.[14]

Interstate Natural highlights the unreasonableness of the FERC's effort to devolve such regulatory responsibilities to the natural gas producing states: "It cannot be doubted that [the FERC's] regulation is predominantly a matter of national, as contrasted to local concern." 331 U.S. at 692. *See also Sierra Club*, 701 F.2d at 1038 (State agencies are established to pursue defined state goals; it is impermissible to delegate a federal agency's authority and responsibility to a local agency that "would not be likely to bring the needed objectivity to the mandated evaluation of federal interests."). Even if the regulatory goals of a state agency were coincidental with the FERC's national mission under the NGA, producing states may be ill-equipped to assume the regulation of gatherers that are affiliated with interstate pipelines.[15]

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[14] In *Interstate Natural*, the Court stated: "All the gas sold in these transactions is destined for consumption in States other than Louisiana. Unreasonable [gathering] charges exacted at this [production] stage of the interstate movement become perpetuated in large part in fixed items of costs which must be covered by rates charged subsequent purchasers of the gas including the ultimate consumer. It was to avoid such situations that the Natural Gas Act was passed." 331 U.S. at 692-93. Even if El Paso affords nondiscriminatory access to its interstate pipeline as the FERC intends, deregulation of Field Services affords no protection against unreasonable or monopolistic gathering charges.

[15] The Commission's expressed desire that the states "step up to the plate," *see* App. H, mistakenly assumes that the producing states are well-suited to handle the task. One "obvious problem . . . is that natural gas markets may not match state boundaries." McArthur, 18 Energy L. J. at 25 n.60. Producing fields do not follow state borders, as evidenced by the San Juan Basin, involved in this case, which is "one of the largest gas producing areas in the United States," *id.* at 33, and "is located in northwestern New Mexico and southwestern Colorado." 72 F.E.R.C. at 62,005 (App. B at B-8). Further, as a practical matter, requiring state regulation of gathering facilities

The Commission's refusal to consider competition in its grant of abandonment to El Paso is further indication of the unreasonableness of the Commission's interpretation of its regulatory responsibility. Pursuant to Section 7(b) of the NGA, before allowing a natural gas company to abandon facilities subject to the Commission's control, the Commission must find that "the present or future public convenience or necessity permit such abandonment." 15 U.S.C. § 717f(b) (App. G at G-2). Such a determination requires the Commission to consider competition. *See Consolidated Edison Co. v. FERC*, 823 F.2d 630, 636 (D.C. Cir. 1987) (The appropriateness of abandonment should be determined based on its economic consequences and its effect on the market as a whole).[16]

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would be inefficient, as pipelines do not keep their books on a state-by-state basis. McArthur, 18 Energy L. J. at 82. Oklahoma reportedly told the Commission in 1994 "that it did not have the resources to regulate." *Id.* at 79 (citation omitted). For the most part, states do not have regulatory schemes in place that would oversee the natural gas industry. For example, in 1995, Texas, New Mexico, Oklahoma, and Kansas produced over half of the natural gas in the mainland United States. *Id.* However, not one of these states set rates, and not one required that gatherers file rate information. *Id.*

[16] The Commission unreasonably disregarded probative evidence of El Paso's monopoly power. Indeed, in 1991, the FERC itself affirmed the need to regulate El Paso's gas transportation rates "[b]ecause El Paso continues to have a monopoly over transportation." *See El Paso Natural Gas Co.*, 54 F.E.R.C. (CCH) ¶ 61,316 at 61,943 (1991). Further, in a civil antitrust action brought by the United States Department of Justice ("DOJ"), the DOJ claimed that El Paso was unlawfully tying meter installation to its gas gathering service and stated that "El Paso's San Juan gathering system has market power for gas gathering for wells in the San Juan Basin. Many San Juan Basin producers have no alternative to El Paso for gathering." *United States v. El Paso Natural Gas Co.*, Proposed Final Judgment and Competitive Impact Statement, 60 Fed. Reg. 5217 (Jan. 26, 1995). *See United States v. El Paso Natural Gas Co.*, 1995-2 Trade Cas. (CCH) ¶ 71,118 (D.D.C. 1995) (resulting Consent Decree). It is hornbook law that such evidence of anticompetitive behavior is "intimately involved in a determination of what

The Commission has attempted to justify its refusal to consider competition for gathering services, a factor clearly relevant to the NGA, as an effort to avoid the burden of case-by-case determinations, a factor that is irrelevant under the NGA.[17] As case law makes clear, however, agency actions explained by factors extraneous to the legislative design are arbitrary and capricious[18] and by implication unreasonable under *Chevron* Step Two.[19]

The Commission's determination to disregard El Paso's market power over gathering services, its desire to delegate responsibility for national consumer protection concerns to natural gas producing states, as well as the other concerns recognized by the Fifth Court (*see supra* Statement of the Case, Part C), all indicate that the Commission's new gathering policy is unreasonable "in light of the legislature's revealed design" and should not be affirmed under *Chevron.*

In sum, the Orders of the Commission conflict with the legislative design of the NGA as interpreted by this Court, and the Fifth Circuit erroneously applied *Chevron* as compelling

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action is in the public interest" and *must* be weighed by the Commission. *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 958 (D.C. Cir. 1968).

[17] In another case in which the Commission refused to consider whether competition exists in the relevant gathering areas, the Commission stated: "[T]o determine on a case-by-case basis whether competition exists would be unreasonably burdensome and time consuming, in part because there is no agreement as to the standard by which competition should be measured." *Mid Louisiana Gas Co.*, 67 F.E.R.C. (CCH) ¶ 61,255 at 61,850 (1994).

[18] *See Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[A]n agency rule [is] arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider . . . . ").

[19] *National Ass'n of Regulatory Util. Comm'rs*, 41 F.3d at 726.

deference to the Commission's abdication of its regulatory responsibilities under the NGA. Petitioners respectfully request that the Court grant certiorari to clarify the proper construction of the NGA over interstate pipelines and pipeline gathering affiliates, and to provide guidance as to the proper application of *Chevron.*

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that the writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

PACIFIC GAS AND ELECTRIC COMPANY; Southern California Gas Company; Southern Union Gas Company, Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Respondent.

NEW MEXICO ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT; Commissioner for Public Lands For The State of New Mexico, Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Respondent.

No. 96-60036, No. 96-60039

United States Court of Appeals, For the Fifth Circuit

February 19, 1997

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Joel L. Greene, Washington, D.C., for Salt River Project, intervenor.

Richard C. Green, Judy A. Johnson, Kenneth M. Minesinger, for El Paso Natural Gas Company, intervenor.

Kim Martin Clark, John, Hengerer & Esposito, Washington, D.C., for Meridian Oil Inc.'s, intervenor.

Steven Robert Hunsicker, Samuel J. Waldon, Debra Raggio Bolton, Baker & Botts, Washington, D.C. for New Mexico Energy, Minerals and Natural Resources Dept. and Commissioner for Public Lands for the State of New Mexico, petitioners.

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Barbara S. Jost, Huber, Lawrence & Abell, Washington, D.C., for Phelps Dodge Corporation, intervenor.

Petitions for Review of an Order of the Federal Energy Regulatory Commission.

Before HIGGINBOTHAM, BARKSDALE and EMILIO M. GARZA, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This case requires us to decide whether the Natural Gas Act supplies the Federal Energy Regulatory Commission with jurisdiction over gathering facilities operated by a corporation that is wholly-owned by an interstate natural gas pipeline company. We affirm FERC's conclusion that these gathering facilities are beyond its regulatory reach, notwithstanding the fact that the gatherer is a subsidiary of a pipeline company that transports gas in interstate commerce.

I.

El Paso Natural Gas Co., one of the nation's largest natural gas pipeline companies, owns and operates twenty-nine gathering facilities in New Mexico, Colorado, Oklahoma, and Texas. Because some of these facilities are subject to

certificates of public convenience and necessity, El Paso sought FERC's permission in 1994 to abandon its gathering facilities and convey them, along with treating and processing facilities, to El Paso Field Services Co., which it would own in its entirety. El Paso established a Field Services Division in 1991, and it explained in its FERC application that conveying facilities to the liberated Field Services Co. was the culmination of years of corporate reorganization.

After notice of El Paso's application was published in the Federal Register, forty-six parties filed motions to intervene. Some of the intervenors sought to prevent El Paso from using Field Services as a means of escaping FERC regulation. FERC issued El Paso's abandonment order on September 13, 1995, effective January 1, 1996. According to FERC, it "does not have jurisdiction over companies such as Field Services that perform only a gathering function." *El Paso Natural Gas Co.*, 72 F.E.R.C. 61,220, at 62,014 (Sept. 13, 1995). The order imposed two conditions on Field Services: (1) it had to amend its tariff to guarantee nondiscriminatory access to the facilities and arm's-length dealings between El Paso and Field Services, and (2) it had to offer existing customers a two-year default contract that would preserve the status quo[1] FERC refused to hold a full evidentiary hearing on the matter and declined the intervenors' request to examine whether Field Services would face sufficient competition. FERC did, however, reserve the right to assert its jurisdiction over Field Services if El Paso and Field Services failed to maintain their separate corporate

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[1] Because El Paso has not challenged FERC's power to require Field Services to offer default contracts, that issue is not part of this appeal. Cf. *Conoco, Inc. v. FERC*, 90 F.3d 536, 553 (D.C. Cir.) ("We conclude that the Commission did not adequately explain its jurisdiction to condition approval of the spin-down of gathering facilities on a default contract mechanism . . . ."), *cert. denied*, __ U.S. __, 117 S. Ct. 1017 (U.S. 1997).

identities. FERC denied rehearing in a written opinion on November 29, 1995. Five intervenors have filed this appeal and asked us to invalidate the abandonment order. Three are local distributors of natural gas who use the El Paso system: Pacific Gas & Electric Co., Southern California Gas Co., and Southern Union Gas Co. The other two are units of the State of New Mexico: the New Mexico Department of Energy, Minerals, and Natural Resources; and the Commissioner of Public Lands for the State of New Mexico. Many of the remaining intervenors have aligned themselves with these parties. The appellants argue that allowing El Paso's wholly-owned subsidiary to operate El Paso's gathering facilities without any regulatory oversight and without any significant competition will lead to unreasonably high natural gas prices.

II.

As a threshold matter, we must ensure that the local distribution companies and the New Mexico appellants have standing to challenge FERC's order. According to El Paso, the abandonment order does not threaten these appellants with any concrete, imminent injury. The local distribution companies, on the other hand, insist that they will inevitably be forced to pay higher gas prices if FERC ends its regulation of the rates charged by the gathering facilities through which the gas must pass. The New Mexico appellants assert that they have an interest not only in protecting their citizens from monopolistic gathering facilities, but also in avoiding the expense of imposing their own regulation of natural gas to compensate for FERC's decision to bow out of the regulation of gatherers affiliated with interstate pipelines. *See Florida v. Weinberger*, 492 F.2d 488, 494 (5th Cir. 1974) ("The State of Florida has standing, arising from its clear interest . . . in being spared the reconstitution of its statutory [system for licensing nursing homes].").

In addition to the constitutional and prudential standing limitations, the Natural Gas Act itself specifies who may challenge FERC's orders issued under the Act. *See* 15 U.S.C. § 717r(a) (granting the rights to seek rehearing before FERC and review in a circuit court to "aggrieved" states, municipalities, and state commissions); 15 U.S.C. § 717r(b) (granting the same rights to "aggrieved" parties to FERC proceedings). A party has not been "aggrieved" by a FERC decision unless its injury is "present and immediate." *Tenneco, Inc. v. FERC*, 688 F.2d 1018, 1022 (5th Cir. 1982). Case law has not established how this test for standing might differ from the test developed under Article III. *See, e.g., American Agriculture Movement v. Board of Trade*, 848 F. Supp. 814, 819 n.6 (N.D. Ill. 1994) (suggesting that standing cases decided under § 717r do not always provide solid authority for standing cases decided under Article III), *aff'd in part* and *rev'd in part*, 62 F.3d 918 (7th Cir. 1995).

El Paso directs our attention to *Williams Gas Processing Co. v. FERC*, 17 F.3d 1320 (10th Cir. 1994), another case in which an interstate pipeline company created a wholly-owned subsidiary to take over its gathering facilities and thus escape regulation. FERC responded to the pipeline's application to abandon the facilities in much the same way that FERC responded to El Paso's application: it granted the request, placed no rate restrictions or reporting obligations on the affiliate, and explained that its jurisdiction over the affiliate would arise if the parent and the affiliated subsidiary failed to subscribe to an open-access policy. Natural gas producers and shippers intervened in the FERC proceedings and ultimately petitioned for review in the Tenth Circuit because they did not want to pay an unregulated entity for gathering and transportation costs. The court held that these intervenors did not have standing under § 717r(b) because they could not show a looming, unavoidable threat of injury from the FERC action:

> There is no evidence in this record that Chevron and Conoco have suffered, or will unavoidably suffer, an economic injury as a result of the Commission's orders. Their fear that Williams will charge unreasonable rates is only speculation for now, and even if it materializes, they can challenge the reasonableness of Williams's rates under section 5 [of the Natural Gas Act], 15 U.S.C. § 717d.

Williams, 17 F.3d at 1322.

We question whether the appellants could make use of § 717d at some later time to challenge unreasonably high rates. That section applies only to rates charged by natural gas companies that make sales within FERC's jurisdiction. In both *Williams* and in this case, FERC decided that affiliated gathering companies are not natural gas companies unless they act "in connection with" their parent pipelines. Section 717d would be available to these appellants if Field Services were to charge rates that discriminated against entities other than El Paso. But under FERC's order, there would be no jurisdiction over Field Services on the basis of unreasonably high rates as such. Furthermore, *Williams* fails to take account of any injury that might come from terminating the affiliated gatherer's duty to report rates. Unless the gatherer has such a duty, the distributors must rely on FERC's oversight to ensure that the gatherer does not abuse its potentially monopolistic power.

In addition to *Williams*, El Paso relies on *Shell Oil Co. v. FERC*, 310 U.S. App. D.C. 312, 47 F.3d 1186, 1200-03 (D.C. Cir. 1995). In that case, Shell Oil objected to FERC's conclusion that the Interstate Commerce Act, which provides rate protection and tariff requirements, does not apply to a pipeline system located entirely on the Outer Continental Shelf. Shell obtained access to the pipeline in the FERC proceeding

under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1334(f). Shell appealed because it objected to FERC's further conclusion that the Interstate Commerce Act does not grant FERC jurisdiction over pipelines that lie entirely on the outer continental shelf. The D.C. Circuit held that Shell did not have standing to pursue such an appeal because "the risk of injury. . . flows from the legal rationale employed by the Commission in its Order, not from the denial of relief actually sought by *Shell* before the agency." *Shell Oil*, 47 F.3d at 1201.. The court went on to reject Shell's contention that "the hypothetical imposition of unreasonable but non-discriminatory rates suffices for purposes of finding injury in fact." *Id.* at 1202 n.33. This case is different from *Shell Oil* because the local distribution companies and the New Mexico appellants have argued all along the same thing they are arguing here: that FERC must regulate Field Services under the Natural Gas Act. Furthermore, Shell's potential injuries from rate increases were more speculative than the potential injuries in this case because a group of pipeline owners competed among themselves to sell capacity on the pipeline, and FERC determined that the pipeline was underutilized even with Shell's purchase of pipeline capacity. *Id.* at 1202. Other cases cited by El Paso are also distinguishable. *See Colorado Interstate Gas Co. v. FERC*, 83 F.3d 1298, 1301 (10th Cir. 1996) (holding that a natural gas company that had agreed to report its gathering rates and provide non-discriminatory access was not "aggrieved"); *State ex rel. Sullivan v. Lujan*, 969 F.2d 877, 882 (10th Cir. 1992) (holding that Wyoming did not have standing to challenge the Interior Department's exchange of land rich in coal because it could not show that the Department would have leased the land for coal mining and thus have entitled Wyoming to royalties); *Panhandle Producers v. Economic Regulatory Admin.*, 847 F.2d 1168, 1173-74 (5th Cir. 1988) (holding that an association of natural gas producers did not have standing to challenge the ERA's failure to refer its policy of authorizing imports of

Canadian gas to FERC because the association was not within the statute's zone of interest); *Tenneco, Inc. v. FERC*, 688 F.2d 1018, 1022 (5th Cir. 1982) (holding that a natural gas pipeline company did not have standing to challenge FERC's decision to transform an adjudicatory hearing into an off-the-record investigation because the decision did not adjudicate facts or deprive the pipeline of property).

We hold that the local distribution companies and the New Mexico appellants have standing to challenge FERC's abandonment order. When an agency deregulates a major portion of a distributor's supply structure, the threat to the distributor's economic security is not merely speculative. It is likely that Field Services will charge a higher price than it would have under FERC regulation. Thus, these appellants have a considerable interest in the regulatory status of affiliated gatherers and will be unable to challenge FERC's treatment of the issue if FERC's position that affiliated gatherers are outside of its jurisdiction becomes established precedent. We have recognized a similar principle in affording standing to pipeline companies facing a high risk of economic injury by FERC's treatment of their competitors. *Pacific Gas Transmission Co. v. FERC*, 998 F.2d 1303, 1307 n.4 (5th Cir. 1993). Down-stream gas distributors are within the zone of interest contemplated by the rate regulation provisions of the Natural Gas Act. *See Interstate Natural Gas Co. v. Federal Power Comm'n*, 331 U.S. 682, 693, 91 L. Ed. 1742, 67 S. Ct. 1482 (1947). And similar cases have either explicitly or implicitly found that entities other than direct competitors can have a sufficient interest in a pipeline's regulatory status to confer standing. *See, e.g., Conoco, Inc. v. FERC*, 319 U.S. App. D.C. 313, 90 F.3d 536 (D.C. Cir. 1996) (allowing producers to challenge a pipeline's spin-off of an affiliated gathering company), petition for cert. filed, 117 S. Ct. 1017 (U.S. 1996); *Mississippi Valley Gas Co. v. FERC*, 314 U.S. App. D.C. 293,

68 F.3d 503, 507-08 (D.C. Cir. 1995) (finding that a local distribution company had standing to challenge FERC's adjustment of a pipeline's rates).

III.

We review FERC's abandonment order to ensure that it is "based on a permissible construction" of the Natural Gas Act; "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984). An interpretation is reasonable so long as it is not "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844, 104 S. Ct. at 2782. In this case, we must determine whether FERC imposed a reasonable construction on the description of its statutory powers in sections four and five of the Natural Gas Act, 15 U.S.C. §§ 717c(a) & 717d(a), which allow FERC to regulate prices charged "in connection with" the transportation or sale of natural gas that is subject to FERC jurisdiction.

The local distribution companies and the New Mexico appellants rely principally on language in *Northern Natural Gas Co. v. FERC*, 929 F.2d 1261, 1269 (8th Cir.), *cert. denied*, 502 U.S. 856, 112 S. Ct. 169, 116 L. Ed. 2d 132 (1991). The *Northern Natural* court held that FERC may regulate gathering facilities owned by natural gas companies in spite of the fact that gathering facilities are explicitly excluded from FERC's jurisdiction under 15 U.S.C. § 717(b). Such regulation, the court reasoned, was necessary to perform FERC's role of preventing unfair trade practices by monopolistic pipelines under §§ 717c & 717d. 929 F.2d at 1273. It explained that "it would be inconsistent to hold that the Commission may not regulate rates for transportation over a pipeline's own gathering

facilities performed in connection with admittedly jurisdictional interstate transportation." *Id.* at 1269.

We do not find this language controlling in this case. *Northern Natural* did not involve an affiliated gatherer. According to *Conoco, Inc. v. FERC*, 90 F.3d 536 (D.C. Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 1017 (1997), that fact makes all the difference. In *Conoco*, a case decided after the parties in this case submitted the appellate brief, a pipeline created a corporate subsidiary to take over its gathering facilities so that it could "operate on a level playing field with . . . independent gatherers unregulated by the Commission." 90 F.3d at 541. As in this case, FERC allowed the pipeline to abandon the facilities to the affiliate so long as it included equal-access provisions in its tariff and offered customers a default contract to preserve the status quo for at least two years. The court held that FERC's order was not an arbitrary and capricious interpretation of the statute because transportation and sales by truly independent gathering affiliates could be understood as not "in connection with" transportation or sales by interstate pipelines. *Id.* at 547.

Our task is not to determine whether the regulatory structure that FERC gleans from the Natural Gas Act is the most sensible. There is room to question whether the formality of creating a separate corporate entity justifies turning a heavily regulated gathering facility into a facility that is outside of FERC jurisdiction. The appellants express a legitimate concern that FERC's reading gives little assurance that affiliated gatherers will in fact act independently of the pipelines that own them. Although FERC states that it will re-assert its jurisdiction if the gatherers adopt rate or access practices that discriminate in favor of their parent pipelines, it is not clear what mechanism FERC might use to enforce its threat.

Nevertheless, the *Conoco* court is correct that FERC's reading of "in connection with" is a permissible interpretation of the statute under the Chevron doctrine. The statute itself states that it does not apply to gathering activities. If Field Services were not owned by El Paso, there would be no question that FERC does not have the authority to regulate it. The statute does not address affiliated gatherers, and the petitioners have not cited any cases that conflict with FERC's reasoning that a gatherer that deals with its parent even-handedly should get the same treatment as a gatherer whose owners are not involved in jurisdictional activities. The statutory language, then, allows FERC to treat Field Services on its own terms and not as a company that provides transportation or sales "in connection with" jurisdictional activities. *See also Altamont Gas Transmission Co. v. FERC*, 320 U.S. App. D.C. 98, 92 F.3d 1239, 1245-46 (D.C. Cir. 1996) (deferring to FERC's determination that coordination and integration at arm's length between Pacific Gas Transmission, an interstate pipeline company, and PG&E, a nonjurisdictional intrastate distribution company, did not give FERC jurisdiction over the subsidiary pipeline company), *petition for cert. filed*, 65 U.S.L.W. 3531 (U.S. Jan. 22, 1997)).

The local distribution companies and the New Mexico appellants also argue that FERC violated the Act because it failed to consider whether competition was sufficient to warrant granting El Paso's abandonment request. Under 15 U.S.C. § 717f(b), FERC may not authorize abandonment unless it finds that "future public convenience or necessity permit such abandonment." FERC's response to this argument curiously suggests that it does not have the power to examine whether abandonment would be in the public interest when a pipeline is abandoning its gathering facilities to a nonjurisdictional entity. As we read the statute, it makes no difference who gets the facilities or, indeed, whether anyone gets them at all –

"abandonment within the meaning of NGA § 7 is an act that permanently reduces a significant portion of a particular service dedicated to interstate markets." *Columbia Gas Transmission Corp. v. Allied Chemical Corp.*, 652 F.2d 503, 511 (5th Cir. Aug. 1981) (citing *Reynolds Metals Co. v. FPC*, 175 U.S. App. D.C. 177, 534 F.2d 379, 384 (D.C. Cir. 1976)). But any error on FERC's part was inconsequential. FERC has the authority to develop its own methods of ensuring public convenience and necessity. *Consolidated Edison Co. v. FERC*, 262 U.S. App. D.C. 222, 823 F.2d 630, 636 (D.C. Cir. 1987). FERC did consider antitrust problems that could arise from El Paso's spin-off of its gathering facilities and took steps to maintain competition by requiring open access and default contracts and threatening to re-assert its jurisdiction if Field Services should act discriminatorily. The statute does not require a more specific inquiry into the state of competition so long as FERC has carefully evaluated the danger that abandonment will lead to monopoly and acted to maintain competition. *See generally United Distribution Cos. v. FERC*, 88 F.3d 1105, 1134-42 (D.C. Cir. 1996) (granting petitioners relief "insofar as the Commission stated . . . that any change to injection and withdrawal schedules can be effected without a § [717f(b)] abandonment proceeding," but generally deferring to FERC on the adequacy of its protections against monopoly power), *petition for cert. filed*, 65 U.S.L.W. 3531 (U.S. Jan. 31, 1997).

In sum, we choose to follow the D.C. Circuit's lead and hold that FERC construed the Natural Gas Act reasonably when it determined that gatherers are outside of its statutory jurisdiction even if they are wholly-owned subsidiaries of interstate pipeline companies.

AFFIRMED.

APPENDIX B

El Paso Natural Gas Company,
72 F.E.R.C. (CCH) ¶ 61,220 (1995)

El Paso Natural Gas Company
Docket Nos. CP94-183-000 and 001

FEDERAL ENERGY REGULATORY COMMISSION

Order Authorizing Abandonment

September 13, 1995

Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, James J. Hoecker, William L. Massey, and Donald F. Santa, Jr.

On January 14, 1994, El Paso Natural Gas Company (El Paso) filed an application pursuant to section 7(b) of the Natural Gas Act (NGA) and section 157.5, *et seq.*, of the Commission's Regulations, as supplemented on January 6, February 28 and March 6, 1995. El Paso requests abandonment authority for its gathering system facilities that remain subject to certificates of public convenience and necessity. El Paso states that it is transferring all of its gas gathering, treating, and processing functions to El Paso Field Services Company (Field Services)[1] as part of El Paso's corporate restructuring. El Paso requests that the Commission authorize this abandonment effective January 1, 1996.

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[1] Field Services is a wholly-owned subsidiary of El Paso.

In addition to the abandonment authorization, El Paso requests authority to cancel certain special rate schedules which apply to services that Field Services will provide after the transfer and to revise its tariff to delete or modify various provisions to reflect the fact that it will no longer be providing gathering or other production area services.

On March 28, 1995, El Paso filed a default contract and a motion requesting expedited consideration of the contract.

For the reasons discussed below, we will grant El Paso's requests to abandon certain certificated facilities, with conditions, cancel certain special rate schedules and modify its tariff. We will deny the protests to the abandonment and we will accept the default contract with modifications.

I. Background

El Paso states that it operates an extensive interstate pipeline system made up of two principal segments: (1) a mainline system consisting of large diameter, high pressure transmission lines; and (2) extensive field or gathering systems with numerous field lines and related treating and processing facilities located in the San Juan, Permian and Anadarko Basins.

El Paso states that its system, both mainline and field, was originally constructed to receive and transport natural gas supplies which were produced or purchased by El Paso for resale to various municipalities, local distribution companies, and industrial customers located in the States of Texas, New Mexico, Arizona, Nevada and California. The location, extent and configuration of the system, particularly of the gathering segment, was specifically designed and operated to support this merchant function.

As a result of its Order No. 636 restructuring settlement in Docket No. RS92-60-000, *et al.*, El Paso states that it has unbundled its sales services and rates from its transportation services and rates. El Paso further states that the settlement provides for the phased unbundling of the costs of field gathering and other production area facilities from mainline transmission rates. Unbundling will occur in a series of annual steps to be completed January 1, 1996, progressively eliminating the cost of field facilities from the transmission cost of service.

El Paso indicates that the settlement provides for staged increases in maximum field transportation rates to reflect the additional costs being allocated to gathering during the phase-out period. The settlement also requires that if the Commission grants any El Paso request for light-handed regulation,[2] the rate for gathering services for 1996 will not be in excess of $.19 per dth absent a shipper's express agreement to pay a higher rate. If the Commission does not grant the request for light-handed regulation, the $ 0.19 per dth cap will not apply, and El Paso instead may file for and collect any gathering or production area service rate permitted under the NGA. Finally, the settlement requires El Paso to file a new general rate case with rates to become effective no later than January 1, 1996.

El Paso established its Field Services Division in June 1991 for the purpose of assuming responsibility for its gathering, dehydration, purification and products extraction activities. Effective June 29, 1993, Field Services was established as a separate corporation for this same purpose.

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[2] *See Northwest*, 59 F.E.R.C. (CCH) ¶ 61,115 (1992).

II. Proposal

El Paso states that most of the facilities it proposes to transfer to Field Services have never been certificated. El Paso states further that, as is the case with many interstate pipeline companies which constructed facilities over many years, its gathering systems contain certain facilities that were certificated even though, under current legal tests, they constitute nonjurisdictional gathering facilities. Moreover, many of these facilities were constructed in connection with projects that were certificated in their entirety without differentiation between jurisdictional transmission lines and nonjurisdictional gathering lines. El Paso seeks abandonment authorization for these certificated facilities, as described below.

El Paso states that, after the facility transfer, it will no longer perform any gathering, dehydration, purification, or products extraction activities, nor will it own any facilities for that purpose.[3] El Paso further states that it will retain its function of providing jurisdictional interstate transportation services on an open-access basis and will remain a natural gas company within the definition of NGA section 2(6) and fully subject to the Commission's jurisdiction.

El Paso indicates that it does not seek to transfer to Field Services any facility which the Commission finds must remain as a jurisdictional transmission facility for which a certificate under the NGA is required. El Paso states that the

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[3] El Paso also owns certificated gathering and compression facilities located in the High Island, Offshore Texas area which it intends to dispose of separately prior to January 1, 1996. El Paso filed in Docket No. CP95-475-000 to abandon these facilities by transfer to Field Services. The order on that application is being issued cocurrently with the order in this proceeding.

establishment of Field Services as a separate corporation and the transfer of its non-jurisdictional gathering and other field facilities to Field Services will complete the planned realignment of its functions.

Upon transfer of the facilities, Field Services intends to operate in an open-access manner consistent with the Commission's policies for jurisdictional transmission companies. El Paso further states that the transfer will be subject to all of its contractual obligations existing at the time, and that Field Services will agree to provide gathering and other production services previously provided by El Paso.

El Paso proposes that the parties receiving such services will be required to negotiate with Field Services to establish the rates, terms and conditions that will apply, but Field Services will propose rates, terms and conditions that are completely non-discriminatory and consistent with the Commission's open-access policies. We note that, subsequent to its application, El Paso submitted a default contract, discussed below, which sets forth rates, terms and conditions for Field Services' gathering and production services.

The facilities El Paso seeks to abandon are located in El Paso's three gathering areas, the Anadarko, Permian and San Juan Basins. These gathering systems and the facilities proposed to be abandoned are described below.

Anadarko Basin Area

The Anadarko Basin is geographically located in the southwestern part of the State of Kansas, the panhandle and western part of the State of Oklahoma, the northeastern part of the panhandle in the State of Texas and a small portion of the southeastern part of the State of Colorado.

In its response to a staff data request, El Paso states that it proposes to transfer six gathering systems located in the Anadarko Basin Area to Field Services. The gathering systems are Beckham, Hobart Ranch, Howe Ranch, Mills Ranch, Roberts County, and South Zyback. Within these six systems, there are four trunk lines that El Paso will transfer to Field Services. These four lines, with their approximate lengths are:

(1) Line No. 30118, 29.47 miles in length;
(2) Line [*8] No. 30119, 10.79 miles in length;
(3) Line No. 3095, 55.50 miles in length; and
(4) Line No. 3096, 8.69 miles in length.

El Paso states that these lines are integral parts of the gathering systems in that they have wells connected to them and/or only function in the movement of gathering gas between gathering systems or to mainline facilities. El Paso proposes to retain four certificated transmission mainlines in the Anadarko Basin to which the gathering systems may connect for transmission on El Paso's interstate system.[4]

Permian Basin Area

The Permian Basin is located in the eastern half of Eddy County, all of Lea County and the southeast quarter of Chaves County, New Mexico, and in the central area of west Texas. El Paso's facilities that are subject to the proposed transfer to Field Services are situated in Eddy and Lea Counties, New Mexico

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[4] These are: (1) Line No. 3044, an 18-inch line from Panoma No. 1 Plant to El Paso Shafer Plant; (2) Line No. 30116, a 20-inch loop line from Panoma No. 1 Plant to El Paso Chafer Plant; (3) Line No. 30120, a 20-inch line from Lear Delivery Point to Panoma No. 1 Plant; and (4) Line No. 30121, a 16-inch line from Elk City Compressor to the facilities of Natural Gas Pipeline Company of America.

and Pecos, Reeves, Ward, Terrell, and Culberson Counties, Texas.

El Paso states that it owns 14 gathering systems[5] located in the Permian Basin Area that it proposes to transfer to Field Services.[6] Within the 14 gathering systems, there are nine trunk lines that El Paso proposes to transfer to Field Services. These nine trunk lines, with their diameters and approximate lengths are:

(1) Line No. 1002, a 6-5/8-inch Jal-El Paso Line to Carlsbad Junction Line, 18.51 miles in length;
(2) Line No. 1003, a 6-5/8-inch Jal-El Paso Line to Carlsbad Junction Loop Line, 16.99 miles in length;
(3) Line No. 1009, a 12-3/4-inch Eunice Plant to Carlsbad Junction Line, 44.58 miles in length;
(4) Line No. 3157, an 8-5/7-inch Rojo Caballo Line, 8.82 miles in length;
(5) Line No. 3160, a 16-inch Gomez Field to El Paso-Waha Plant Line, 17.95 miles in length;

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[5] El Paso originally listed 19 gathering systems in the Permian Basin that would be transferred to Field Services. Pursuant to blanket authority (Docket No. CP82-435-000) granted El Paso by the Commission, and pursuant to Section 157.216(b) of the Commission's regulations, El Paso stated that the entire Vinegarone Gathering System was abandoned in place in February 1994 and the Yates-Kerr Gathering System was abandoned in place in March 1994. The Loco Hills, Mescalero-Morrow and Permian Basin Pipeline Gathering Systems are gathering systems which contain no certificated facilities and which have been sold or are no longer being utilized since the wells are producing directly into other companies' gathering systems. El Paso has indicated that these five gathering systems are no longer subject to this proceeding.

[6] The systems are Carlsbad, Eddy County, South Carlsbad, Gomez, Hamon, Hay Hollow, Linterna, Lockridge, McKay Creek, Rojo Caballo, Toro, Verhalen, West Waha, and Worsham.

(6) Line No. 3176, a 24-inch Gomez Field to El Paso-Waha Plant Loop Line, 17.95 miles in length; (7) Line No. 3165, a 12-3/4-inch Worsham Field to El Paso- Waha Plant Line, 6.49 miles in length; (8) Line No. 3174, a 20-inch Lockridge Field to El Paso-Waha Plant Line, 9.88 miles in length; and (9) Line No. 3175, a 20-inch Hamon-Toro Field to El Paso- Waha Plant Line, 13.09 miles in length.

El Paso states that these lines are integral parts of the gathering systems in that they have wells connected to them and/or only function in the movement of gathered gas between gathering systems or to mainline facilities.

El Paso states that it will retain the ten certificated transmission mainlines in the Permian Basin through which it receives gas from its gathering systems for transmission on its interstate system.[7]

San Juan Basin Area

The San Juan Basin is located in northwestern New Mexico and southwestern Colorado. El Paso's facilities that are subject to the proposed transfer to Field Services are situated in San

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[7] These are: (1) Line No. 3079, a 20-inch line from Phillips-Lusk Plant to Permian-San Juan Line; (2) Line No. 1100, the 26-inch California Line; (3) Line No. 1000, the 16-inch Jal-El Paso "A" Line; (4) Line No. 3191, the 16-inch Discharge Line South Carlsbad Station to Pecos River Station; (5) Line No. 3152, the 6-5/8-inch Jal-El Paso Line to Continental Oil Co.-Ramsey Plant Line; (6) Line No. 1600, the 36-inch Waha-Ehrenberg Line; (7) Line No. 3161, a 12-3/4-inch line from Mobil Coyanosa Plant to EPNG Waha Plant; (8) Line No. 3173, a 24-inch line from Puckett Plant to Waha Plant; (9) Line No. 3162, the 20-inch Waha-Keystone Line; and (10) Line No. 3153, the 20-inch Terrell County Line.

Juan, Rio Arriba, and Sandoval Counties, New Mexico and La Plata County, Colorado.

El Paso states that it owns nine gathering systems in the San Juan Basin Area that it proposes to transfer to Field Services.[8] Within these systems, there are 12 trunk lines that El Paso will transfer to Field Services which move the gas to points where the gas can then enter El Paso's mainline system. The twelve pipelines, with their diameters and approximate lengths, are as follows.

(1) Line No. 3200, the 16" Blanco-Fruitland Line, 22.92 miles in length;
(2) Line No. 3204, a 12-3/4" line from Kutz Plant to Blanco- Fruitland Line, 1.21 miles in length;
(3) Line No. 3205, the 12-3/4" Ignacio Line, 22.43 miles in length;
(4) Line No. 3227, the 16" Kutz Discharge Line, 1.95 miles in length;
(5) Line No. 3207, a 30" Lindrith Plant to Chaco Plant Line, 43.90 miles in length;
(6) Line No. 3208, a 30" Angel Peak Lateral 2C-15 to Lindrith Plant Line, 3.18 miles in length;
(7) Line [*13] No. 3209, a 20" Line from Largo Plant to Chaco-Lindrith Line, 6.78 miles in length;
(8) Line No. 3226, the 16" Chaco-Lindrith Line to Largo Plant Line, 6.77 miles in length;
(9) Line No. 3210), the 16" line from Ballard Station to Chaco- Lindrith Line, 0.25 mile in length;
(10) Line No. 3218, the 30" Blanco Plant to Chaco Plant Line, 20.47 miles in length;

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[8] The nine systems are Angel Peak, Bisti, Blanco, Blanco-Fruitland, Chaco, Ignacio, Kutz, Twin Mounds, and Northwest.

(11) Line No. 3221, the 30" Lindrith Plant to Chaco Plant Loop Line, 0.24 mile in length; and
(12) Line No. 3223, the 34" Blanco Plant to Gas Company of New Mexico Exchange Point No. 37 Line, 3.215 miles in length.

El Paso states that these lines are integral parts of the gathering systems in that they have wells connected to them along most or all of their length and/or only function in the movement of gathered gas between gathering systems or to mainline facilities.

El Paso states that it will retain eight certificated transmission mainlines in the San Juan Basin through which El Paso receives gas from its gathering systems for transmission on its interstate system.[9]

Transportation Service Agreements

El Paso maintains that the proposed abandonment and transfer of facilities to Field Services will not require extensive changes in the transportation service agreements (TSA) under which it currently renders transportation services. El Paso's transportation tariff provides as follows:

El Paso and Shipper acknowledge that the executed transportation service agreement does not prohibit either

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[9] These are: (1) Line No. 1205, a 24" line from Blanco Plant to NPC Station No. 1; (2) Line No. 1218, a 20" line from Northwest Ingacio Station to Blanco Plant; (3) Line No. 3201, the 20" Blanco-Fruitland First Loop; (4) Line No. 3222, the 16" Blanco-Fruitland Second Loop Line; (5) Line No. 1202, a 34" Line from Blanco Plant to Gallup Station; (6) Line No. 1212, a 42" loop line from Blanco Plant to Gallup Station; (7) Line No. 1206, the 24" Chaco Plant Discharge Line; and (8) Line No. 1209, the 30" Chaco Plant Discharge Loop Line.

party from selling or transferring its own facilities; therefore, neither El Paso nor Shipper shall have any obligation to provide service under the executed transportation service agreement that requires the use of any facilities sold or transferred; provided, however, El Paso first shall seek abandonment authorization for any jurisdictional facilities or jurisdictional services and Shipper shall have the right to protest such abandonment as inconsistent with the present or future public convenience and necessity.[10]

El Paso states that the provision applies to all of its TSAs which provide for Part 284 transportation and thus governs most transportation services that it currently provides. El Paso states that such TSAs accommodate the transfer of facilities to be implemented on January 1, 1996, and do not require any deletion, addition or amendment.

El Paso states that, although it will cease to provide gathering and related services currently being rendered under its Part 284 TSAs, Field Services intends to offer to provide all of such services on an open-access basis. Thus, there will be no interruption of the services available to any party currently receiving services under such a TSA.

In addition to its Part 284 transactions, El Paso states that, in a few instances, it provides transportation services pursuant to arrangements that are filed as special rate schedules in Volume No. 2 of its FERC Gas Tariff. Certain of these rate schedules provide for gas receipts or deliveries or both utilizing the field facilities that El Paso intends to transfer to Field Services. El Paso has grouped these rate schedules into three categories:

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[10] El Paso's FERC Gas Tariff Volume 1-A, Transportation General Terms and Conditions, Section 13.2, Service Conditions.

1. Volume No. 2 Gathering Agreements are contract obligations which are performed entirely in the gathering systems. Two rate schedules fall into this category. Special Rate Schedule Z-8 is a gathering agreement between El Paso and TOC-Rocky Mountain, Inc., as successor to Tenneco Oil Company, dated May 9, 1984, providing gathering services in the San Juan Basin. Special Rate Schedule Z-9 is a similar gathering agreement between El Paso and Conoco Inc., also dated May 9, 1984, and providing for gathering services in the San Juan Basin.[11] Since the facilities used to provide the gathering services under Rate Schedule Z-8 and Z-9 will be transferred to Field Services, effective January 1, 1996, El Paso requests Commission authorization to cancel Rate Schedule Z-8 and Z-9 and for such abandonment authorization as may be necessary for that purpose.

2. Volume No. 2 Combination Agreements are contracts which provide for El Paso to receive gas on its gathering system and redeliver the gas at delivery points on its mainline system. El Paso states that only one agreement, Rate Schedule T-14, with Natural Gas Pipeline Company of America (Natural), qualifies in this category. El Paso requests authorization to abandon services under Special Rate Schedule T-14 insofar as it provides for gathering or related services utilizing the facilities to be transferred to Field Services. El Paso states that Field Services will provide service as an open-access transporter and specifically intends to provide any necessary gathering services. Further, the services provided under special Rate Schedule T-14 will continue to be available, but, to the

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[11] *See* 31 F.E.R.C. (CCH) ¶ 61,370 (1985).

extent gathering services are required, will be provided under two contracts rather than one. The rate, terms and conditions of the gathering portion of the transportation will have to be negotiated with Field Services.

3. Volume No. 2 Exchange Agreements are contracts which provide for El Paso to receive gas on its mainline system and redeliver the gas on its gathering system, consisting entirely of exchange agreements with other interstate pipelines. El Paso states that it is party to five exchange agreements filed as special rate schedules which provide for it to deliver gas received on its mainline system to delivery points on its gathering system. Such agreements are filed as special Rate Schedules X-41 with ANR Pipeline Company; X-42 with Atlantic Richfield Company; Z-3 with Natural; X-59 with Tenneco Oil Company; and X-12 with Transwestern Pipeline Company. El Paso intends to enter into appropriate agreements with Field Services to accomplish the redeliveries required by any of these special rate schedules which will remain in effect on January 1, 1996, and thus does not request any Commission authorization with respect to such arrangements.

III. Procedural Matters

A. *Interventions*

Notice of El Paso's application was published in the Federal Register on February 14, 1994 (59 Fed. Reg. 6954). Forty-one parties filed timely motions to intervene. Timely, unopposed motions to intervene are granted by operation of rule 214 of the Commission's Rules of Practice and Procedure.[12] ASARCO,

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[12] 18 C.F.R. § 385.214 (1994).

Inc., Cyprus Miami Mining Corporation and Magma Copper Company, jointly; Pro New Mexico Inc. (Pro); Transok, Inc., Transok Gas Transmission Company and Transok Gas Company, jointly; and Williams Field Services Group, Inc. (Williams) filed late motions to intervene. We find that these parties have shown an interest in this proceeding and that their participation will not delay the proceeding or prejudice the rights of any other party. Acordingly, for good cause shown, we will grant their late motions to intervene. All of the intervenors are listed in Appendix A.

B. *Protests, Comments and Answers*

The following parties protested El Paso's application: Amoco Energy Trading Corporation and Amoco Production Company (Amoco), Independent Petroleum Association of America (IPAA), Indicated Shippers, Mewbourne Oil Company (Mewbourne), New Mexico, Pacific Gas and Electric Company (PG&E), Producer-Marketer Transportation Group Gathering Coalition (PMTG), and the Public Utilities Commission of the State of California (CPUC). A number of parties filed comments,[13] requests for hearing and motions to consolidate this proceeding with the proceeding in Docket No. CP94-184-000. El Paso and Field Services filed a motion to file an answer one day out of time and an answer to the intervenors' motions in response to which the Indicated Shippers filed a motion for leave to file an answer and an answer.

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[13] Gas Company of New Mexico (GCNM) supplemented its intervention with comments regarding the decision to transfer certain facilities to Field Services. PNM Gas Services, a division of the Public Service Company of New Mexico, the successor to GCNM, subsequently withdrew those comments.

The Indicated Shippers, New Mexico and Pro filed answers in opposition to El Paso's March 28, 1995 submission of its default contract and motion requesting expedited consideration. El Paso filed an answer.

While our rules do not permit answers to protests or to answers,[14] we may, for good cause, waive a rule.[15] We find good cause to do so in this instance. To achieve a complete and accurate record, we will accept all pleadings tendered to date for filing.

C. *Requests for Consolidation*

Field Services filed a petition in Docket No. CP94-184-000, concurrently with El Paso's filing of its abandonment application in Docket No. CP94-183-000, requesting that the Commission declare that the facilities Field Services would acquire from El Paso were gathering facilities exempt from jurisdiction pursuant to Section 1(b) of the NGA. On March 1, 1995, Field Services filed a notice of withdrawal of its petition for a declaratory order in Docket No. CP94-184-000. The Commission permitted the withdrawal and terminated the docket in an order issued July 26, 1995.[16] Therefore, the motions to consolidate the two proceedings filed by several parties in Docket No. CP94-183-000 are moot.

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[14] *See* 18 C.F.R. 385.213(a)(2) (1994).

[15] 18 C.F.R. 385.101(e) (1994).

[16] *El Paso Field Services Co.*, 72 F.E.R.C. (CCH) ¶ 61,080 (1995).

D. *Requests for Deferral of Action*

Arizona Public Service Company, Phelps Dodge Corporation, and Salt River Project Agricultural Improvement and Power District, jointly, (Arizona Directs), Indicated Shippers, Llano, Inc. and Minerals, Inc. (Llano), PMTG, and SoCal request the Commission to defer analysis of the application until the resolution of Docket No. RM94-4-000. However, rather than resolve the issues in Docket No. RM94-4-000 on generic basis, the Commission has addressed the issues on a case by case basis in a number of orders.[17] Therefore, the parties' requests for deferral of action are dismissed as moot.

SoCal also requests deferral of action until the Court has rendered its decision in *Williams Gas Processing Company v. FERC* (Nos. 92-9553, *et al.*, 10th Cir.). Since the Court dismissed the appeal on February 28, 1994, SoCal's request for deferral of action is dismissed as moot.

E. *Requests for Hearing and/or Technical Conference*

A number of parties request a full evidentiary hearing and/or a technical conference on such issues as the functionalization and proper classification for all of El Paso's production area facilities, the extent of competition in El Paso's production area, the potential for affiliate abuse, and the proposal's effect on system operations.[18] In their joint answer to these requests, El

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[17] *See, e.g., Arkla Gathering Services Co. (Arkla I)*, 67 F.E.R.C. ¶61,257 (1994).

[18] CPUC, GPM, Llano, Mewbourne, New Mexico, PG&E, Phillips, SoCal and Williams.

Paso and Field Services argue that the requests should be denied.

We will deny the requests. An evidentiary trial-type hearing is necessary only where material issues of fact are in dispute that cannot be resolved on the basis of the written record.[19] No such material issues of fact are present here. On February 28, 1995, in response to a Commission data request, El Paso filed extensive information describing in detail the facilities it proposes to abandon to Field Services along with numerous maps providing greater detail than existed in El Paso's original application. This information completed the record for the determination of the classification of the facilities El Paso proposes to abandon necessary in this proceeding. The record is also complete as to the issues of competition, affiliate abuse, and systems operation to the extent required for a Commission decision in these matters.

IV. Discussion

A. *Abandonment*

Since the application pertains to facilities used for the transportation and sale of natural gas in interstate commerce subject to the Commission's jurisdiction, the proposed abandonment is subject to the requirements of NGA section 7(b). As discussed above, El Paso proposes to abandon certain facilities by transfer to its affiliate Field Services. Before a finding that such an abandonment is in the public convenience and necessity, the Commission has required the filing of a default contract to assure the pipeline's gathering customers of

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[19] *See, e.g., Southern Union Gas Co. v. F.E.R.C.*, 840 F.2d 964, 970 (D.C. Cir. 1988).

the availability of continued service for at least two years under the same rates and with similar terms and conditions. As discussed below, El Paso filed a default contract that, with certain modifications, meets the Commission's requirements. Therefore, we find that the abandonment of El Paso's facilities as described herein by transfer to Field Services is in the public convenience and necessity conditioned upon, among other things, El Paso's modifying the default contract as discussed below. We will also permit El Paso to abandon or modify service under the special rate schedules as described above, subject to compliance with Part 154 of the Commission's regulations.

Further, we will require El Paso to file pursuant to section 4 for authorization to terminate its gathering services at lease thirty days prior to the proposed effective date of such authorization. The filing should include the following information: (a) a statement showing the reasons for the termination; (b) a list of the contracts to be terminated, identifying the contract by number and showing the proposed termination date and affected shippers to whom the notice has been mailed; and (c) a list of shippers, if any, that have entered into contracts with El Paso's successor.

We also find that approval of the proposed abandonment does not constitute a major federal action significantly affecting the quality of the human environment.

B. *Refunctionalization Issues*

1. *Protests and Comments*

CPUC, PG&E, Natural Gas Clearinghouse (NGC), and Williams request the Commission to broaden El Paso's abandonment proceeding to consider whether El Paso has

properly functionalized all of its facilities as between the transmission and production function. They assert that, while the settlement has resolved all refunctionalization issues for certain specified facilities, the Commission should broaden this proceeding to review whether the facilities El Paso will retain are properly functionalized.

Mewbourne and Llano raise concerns that many of the facilities that El Paso proposes to transfer to Field Services appear to be transportation rather than gathering facilities. Mewbourne contends that these facilities must remain, or become, certificated and fully regulated, regardless of who owns them. On the other hand, So Cal questions whether El Paso's proposal fully unbundles its gathering facilities and whether further refunctionalization is necessary.

Both SoCal and CPUC note that El Paso proposes that the Chaco gasoline plant be a part of the facilities that are transferred to Field Services. However, El Paso requests that a compressor at that plant not be transferred to Field Services and does not request abandonment of that facility. The compressor is at the inlet of the Chaco Plant and therefore would straddle the facilities owned and operated by Field Services and would not be directly connected to any mainline facilities on the El Paso system.

The Town of Ignacio, Colorado (Ignacio) seeks assurance that El Paso, its sole pipeline supplier, will not abandon its service through the transfer of facilities to Field Services. Ignacio indicates that it is served from a line that will be transferred to Field Services and that its "tap/meter" is listed in El Paso's application in Exhibit Z-1 as being abandoned. Thus Ignacio states that it is not clear how abandonment of service to it can be avoided. Ignacio indicates that it holds a transportation agreement with El Paso, not a gas sales and

purchase agreement. Ignacio states that although the application is not clear, it believes that El Paso has not sought authority to abandon service to Ignacio.

El Paso and Field Services respond that all current refunctionalization issues have been resolved by the settlement. They maintain that if parties wish to raise refunctionalization issues applicable to a future period, they should either be required to wait until El Paso files its rates for the period beginning January 1, 1996, or at a minimum, to file a complaint setting forth their claims and justifying a new proceeding to consider these issues. El Paso and Field Services argue that they should not be permitted to burden this proceeding with their extraneous claims.

El Paso and Field Services contend that if Mewbourne believes that El Paso has failed to obtain a certificate required under the NGA for certain of its facilities, Mewbourne's proper course of action is to file a complaint with the Commission setting forth the facts that support that belief.

El Paso and Field Services maintain that the goal of these parties is to effect a reduction in the rate for the service which most directly impacts the particular party. They contend that such issues are not properly raised in an abandonment proceeding but should be raised, if at all, in the section 4 rate case covering the period beginning January 1, 1996.

Commission Response

Several parties question whether El Paso has proposed to transfer all of its gathering facilities to Field Services or alternatively whether some of the facilities being transferred to Field Services are transportation facilities. SoCal and CPUC in particular have pointed out a compressor located at the inlet of

the Chaco Gasoline Plant. We also question why this facility was omitted from the facilities to be transferred to Field Services. We will require El Paso to show cause why this facility is not being transferred to Field Services.

Parties believing that El Paso should transfer other facilities to Field Services may file a complaint to pursue this issue further.

Ignacio expresses concern that its transportation service will be terminated if El Paso's abandonment proposal is granted. Ignacio points out that it currently receives transportation deliveries from El Paso at a facility which will be transferred to Field Services. El Paso and Field Services clarify that there will be no termination, interruption or diminution in reliability of Ignacio's transportation service as a result of the transfer of facilities to Field Services.

El Paso further states that the parties are in the process of negotiating the contract that will provide for the continuation of transportation service to Ignacio by Field Services. El Paso states that Field Services will deliver gas directly from Field Services' system to Ignacio. We have determined that the facilities to be transferred to Field Services primarily perform a gathering function. The fact that Field Services incidentally uses the facilities to deliver gas to a local distribution company for ultimate distribution to consumers does not alter the overall gathering purpose or function of the facilities.[20]

In a letter filed September 6, 1995, Ignacio confirms that it is negotiating with El Paso and Field Services to transfer the obligation to serve Ignacio from the pipeline to its affiliate.

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[20] *CNG Transmission Corp. and Big Sandy Gas Co.*, 69 F.E.R.C. ¶61,363 at 62,374 (1994).

However, we note that if Ignacio and Field Services do not reach an agreement, El Paso would be obligated to continue service to Ignacio since it is apparent that Ignacio has not agreed to an abandonment of its service from El Paso absent a mutually satisfactory agreement that Field Services will provide the service. Ignacio states that if there is no agreement, El Paso will maintain service by contracting with Field Services to use its facilities. The jurisdictional consequences of such an arrangement are not clear since there is no specific proposal before the Commission. Accordingly, we will condition the abandonment authority granted in this proceeding upon El Paso's showing that Ignacio and Field Services have executed an agreement whereby Field Services will provide service to Ignacio.

In response to the parties requesting a Commission finding in this proceeding as to the proper functionalization of El Paso's facilities, we note that Field Services withdrew its request for a finding regarding the future jurisdictional status of the facilities being transferred to Field Services. However, as discussed more fully below, we have reviewed the maps and other descriptive supporting data provided by El Paso in its application and, in particular, the February 28, 1995, response to the November 30, 1994 data request, and conclude that all of the facilities to be transferred to Field Services will be exempt non-jurisdictional facilities upon their acquisition by Field Services.

2. *Application of the Primary Function Test*

The Commission uses the primary function test as set forth in Farmland Industries, Inc.,[21] as modified in Amerada Hess

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[21] 23 F.E.R.C. (CCH) ¶ 61,023 (1983).

Corporation, *et al.*,[22] to determine whether specific facilities are gathering or transmission in nature. In applying the primary function test the Commission considers the following factors: (1) the length and diameter of the line; (2) the extension of the facility beyond the central point in the field; (3) the line's geographic configuration; (4) the location of compressors and processing plants; (4) the location of wells along all or part of the facility; and (6) the operating pressure of the line. In response to a Commission data request, El Paso applied the six criteria to each of the systems it will transfer to Field Services, as discussed below.

a. *Length and Diameter of the Lines*

The Anadarko Basin contains six gathering systems which are comprised of approximately 656.74 miles of pipeline varying in size from 2 to 20 inches and in length from 0.01 to 55.62 miles. Of the total miles of pipeline, 22.89 miles are comprised of 20-inch pipe; all other pipe sizes are less than 20 inches.

The Permian Basin contains 14 gathering systems which are comprised in total of approximately 848.65 miles of pipeline varying in size from 2 to 24 inches and in length from .01 to 44.26 miles. Of the total miles of pipeline, 1.57 miles are comprised of 24" pipe. El Paso indicates that there are approximately 1.11 miles of 20-inch pipe; all other pipe sizes are less than 20 inches.

The San Juan Basin contains nine gathering systems which are comprised of approximately 4,982.58 miles of pipeline varying in size from 2 to 30 inches and in length from .01 to 30.90 miles. Of the total miles of pipeline, El Paso states that

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[22] 52 F.E.R.C. (CCH) ¶ 61,268 (1990); 67 F.E.R.C. (CCH) ¶ 61,254 (1994).

8.96 miles are 30-inch pipe, 48.18 miles are 24-inch pipe, and 47.92 miles are 20-inch pipe; all other sizes are less than 20 inches.

El Paso's facilities at issue in this proceeding include predominately short, small diameter pipelines, which is consistent with a gathering determination. However, El Paso is also proposing to transfer a rather substantial number of relatively long, large diameter facilities, as listed above, which we agree are gathering facilities. For example, El Paso lists a 55.50 mile segment of 20-inch pipeline (Line 3095) located in the Mills Ranch and South Zybach fields in the Anadarko Basin Area. An examination of the maps shows that this facility is a spine with numerous laterals connected to it and attaches to more than 300 wells. Without exception, all other longer, large diameter pipelines listed are also backbones or spines with numerous laterals attached to large numbers of wells. Therefore, these longer lines are consistent with a gathering determination.

b. *Extension Beyond a Central Point in the Field*

With the exception of the following systems, the remaining systems, according to El Paso, have no true central points in the field.

Gathering System	*Location of Central Point in Field*
1. Beckham	The gas is gathered from the seven wells through a network of well-tie lines converging to a single point where the gas is then metered at a point before entering Natural's pipeline system.
2. Hobart Ranch	Hobart Ranch plant

3. South Carlsbad	The central point could be said to be the point at which one or more laterals connect to a major trunk line or it could be at the point at which the major trunk lines converage at the plant site.
4. McKay Creek	A central point in the field could be considered to exist at the point Lateral A-1 and A-2 intersect Trunk A .
5. Verhalen	The gas is gathered from one well through the well-tie line into the trunk line which connects to the Linterna Gathering System Trunk A.
6. Ignacio	The gas is gathered from wells through the well-tie lines the lateral lines, and the trunk line.

We agree with El Paso's contention that most if not all of the systems have no central point in the field. However, we note that the Commission has determined in previous cases that a facility may still be determined to be gathering if it fails to meet one or more of the six physical criteria. Therefore, the absence of a central point in the field for most of the systems is not determinative.

c. *Geographic Configuration*

El Paso states that virtually all of the gathering systems are either spider-web, backbone or short line in configuration. We agree and note that the larger systems are both spine-like and web-like. Each system is located in the production area. Most of the systems are networks of relatively short lines originating at wells attached to spines which in turn are attached directly to

the mainline or to compressor stations or processing plants located on the mainlines. These facts are consistent with a gathering determination.

d. *Location of Compressors and Processing Plants*

El Paso states that the Anadarko Basin has very little compression located on its facilities. The Hobart Ranch Gathering System contains a field turbine compressor (certificated) with 1,160 horsepower and a dehydration site where the gathering system interconnects with the 16-inch South Zyback Line to Hobart Field Line (Line No. 3096) and the 8-5/8-inch Hobart Ranch to South Zyback to Cities Service Company Line (Line No. 30119). El Paso indicates that deliveries can be made into either line depending on the system operations at any given time. There is a nonjurisdictional 500 horsepower field compressor installed on Trunk A of the Howe Ranch Gathering System. There is also a dehydration site near the interconnection between the Mills Ranch Gathering System and the 20-inch South Zybach Line (Line No. 3095).

El Paso states that the Permian Basin has four field compressor stations (Hamon-Toro; North Carlsbad; McKay Creek; and Lockridge)[23] with a total 6,369 horsepower, that will be transferred to Field Services. There are dehydration facilities located at the North Carlsbad, South Carlsbad, and Hamon-Toro sites that will be transferred to Field Services. The Waha Plant containing purification and dehydration facilities will be transferred to Field Services.

El Paso states that the purification and dehydration are production-type functions needed to prepare the gas for

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[23] El Paso indicates that the 950 horsepower field compression for the Lockridge Gathering System was installed subsequent to this application.

transmission. The exact locations of these compression and processing facilities are listed in Appendix B.

El Paso states that the San Juan Basin has 12 field compressor stations with a total of 34,026 horsepower that are subject to the transfer to Field Services. These are the Angel Peak; Ballard; Bisti Nos. 1, 6, 8 and 9; Kutz; Largo; 3B-1; Lindrith; San Juan Package; and Amoco Gallegos Canyon. There are dehydration facilities subject to the transfer located at the Angel Peak, Ballard, Kutz, Lindrith, and 3B-1 field sites. The Blanco Plant also contains dehydration facilities, and the Chaco Plant contains some products extraction and dehydration facilities to be transferred to Field Services. The exact locations of these compression and processing facilities are listed in Appendix B.

In summary, El Paso proposes to transfer two field compressors and dehydrators in the Anadarko Basin to Field Services, all located well upstream of any mainlines. Likewise, El Paso proposes to transfer four field compressor stations and dehydration facilities located on the field lines in the Permian Basin Area. El Paso also proposes to transfer 12 field compressor stations and five dehydration stations located in the San Juan Basin Area. We agree that these facilities are incidental to the gathering function.

El Paso also indicates that it proposes to transfer the Chaco Gasoline Plant, a products extraction plant, to Field Services. We agree that the purpose of this plant is to extract liquids and other products and is not needed to bring gas up to pipeline quality. Accordingly, we do not consider it to be a jurisdictional transmission facility.

e. *Location of Wells*

El Paso states that there are approximately 459 wells connected to its gathering systems in the Anadarko Basin; approximately 644 wells connected to its gathering systems within the Permian Basin; and approximately 10,956 wells connected to the nine gathering systems within the San Juan Basin. Each system collects gas from wells located along all or part of the system, consistent with a gathering determination.

f. *Operating Pressure of Lines*

The operating pressures of the six gathering systems in the Anadarko Basin range from 300 psig to 1,000 psig. El Paso states that these gathering system pressures are high because the majority of reservoirs underlying the Anadarko Basin from which El Paso receives gas are high pressure reservoirs 10,000 feet or more deep.

The operating pressures of the 14 gathering systems in the Permian Basin range from a low of 75 psig to 100 psig to a high of 500 psig to 750 psig. These pressures, according to El Paso, fluctuate based on the amount of compression utilized and the flow of the gas in the day-to-day operation of the individual systems.

The operating pressures of the nine gathering systems in the San Juan Basin range from a low of 15 psig to 80 psig to a high of 330 psig to 475 psig.

Upon review of the description of each of the systems we conclude that the operating pressures of most of the systems are less than 400 psig, and therefore typical of gathering systems. The six gathering systems in the Anadarko Basin range anywhere from 300 to 1,000 psig because of the higher

gathering system pressures resulting from the high pressure reservoirs underlying the Anadarko Basin. Under these circumstances, the high operating pressures are not inconsistent with a gathering determination.

g. *Non-Physical Factors*

With respect to the non-physical criteria set forth in Amerada Hess, we note that, consistent with the directive in Order No. 636 to unbundle gathering from transmission, El Paso is establishing Field Services to provide unbundled gathering services. Therefore, Field Services will be a gatherer of natural gas and not an entity performing jurisdictional transmission service.

C. *Accounting and Valuation of Abandoned Facilities*

El Paso proposes to transfer its gathering, treating, processing and related facilities (both certificated and non-certificated) to Field Services at their net book value of $221,296,764.[24] El Paso further proposes to transfer the deferred income taxes associated with its investment in the gathering facilities of $ 64,472,175 to Field Services which in turn will assume that liability. El Paso proposes to account for the transfer of the facilities and related deferred income taxes as a capital contribution to Field Services and to record $156,824,589 in Account 123.1, Investment in Subsidiary Companies.

Llano, PG&E and Phillips Petroleum Company and Phillips Gas Marketing Company (Phillips) express concern that El Paso

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[24] Gross Plant $ 519,464,972
Less: Accumulated Prov. for Dep. $ 298,168,208
Net Plant as of November 30, 1994 $ 221,296,764

properly account for the costs of any facilities to be abandoned, and in particular that El Paso not be permitted to transfer facilities to Field Services at less than their appropriate value.

SoCal believes that gathering facilities that are transferred to pipeline affiliates should be evaluated at the higher of what a willing third party would pay for such facilities or the remaining non-depreciated value. Similarly, GPM Gas Corporation (GPM) and Phillips comment that one way to mitigate concerns regarding potential undervaluation of the facilities being transferred to Field Services is to require El Paso to transfer the facilities at a fair market value price rather than at net plant value. GCNM would not oppose the transfer if it is at less than fair market value as long as the transfer is conditioned on an equitable sharing of the additional value of the facilities between El Paso and the customers which have borne the costs and risks associated with those facilities. SoCal also contends that the spin-down should result in a credit back to ratepayers.

Arizona Directs argue that El Paso should be required to supplement its application to describe how it would propose to value the gathering facilities it wishes to spin-down and explain whether it would be willing to share any future profits with its customers resulting from the eventual sale of such facilities to a third party.

El Paso and Field Services state in their answer that the valuation of the field facilities and the crediting to El Paso's jurisdictional rates any amount in excess of the net book value are issues outside the scope of this abandonment proceeding and are violating the spirit and letter of the settlement and the mandates of Order No. 636. Pursuant to Article III of the settlement, El Paso states, the parties agreed that the phase-out of field costs from mainline rates effectuated by the settlement

constituted a "complete, final and permanent resolution" of all issues relating to the unbundling of field and mainline costs.

El Paso states that the issue of transition cost recovery of any of its gathering facilities will not arise since it does not intend to seek such transition costs. In any case, El Paso maintains, the valuation issue does not belong in the current proceedings since it pertains to a possible impact of the planned transfer upon future mainline rates.

Commission Response

Upon review of El Paso's accounting for the corporate realignment, we have determined that it is proper and conforms to the requirements of the Uniform System of Accounts except for a technical violation in that El Paso did not use Account 102, Gas Plant Purchased or Sold, to record the transfer.[25] We will require El Paso to comply with the requirements of Account 102, Gas Plant Purchased or Sold, and submit the required journal entries to record the abandonment by transfer of the facilities.

We note that our approval of the accounting for the abandonment does not constitute a determination by the Commission regarding the effect of this transaction on Order No. 636 stranded investment costs.

As to the arguments regarding the proper valuation of the transferred facilities, the Commission has addressed similar arguments made in other pipeline abandonment/spin-down

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[25] Gas Plant Instruction No. 5 provides for the transfer of gas plant constituting an operating unit or system and requires the use of Account 102 to record the transfer of property. In effect, Account 102 is used as a clearing account for these transactions.

proceedings.[26] In those cases, the Commission expressed concerns about pipelines' transferring facilities to affiliates that have a market value higher than their book value while retaining and seeking to recover stranded investment costs for gathering facilities with a market value lower than the book value. The Commission approved the transfers at net book value but put pipelines on notice that if they seek to recover stranded investment costs for gathering facilities, the Commission will consider all the pipeline's gathering transactions, including the transfer of assets to an affiliate, when assessing the recoverability of such stranded costs.[27] Accordingly, we will approve El Paso's proposal to transfer its facilities to Field Services at net book value and note that the Commission will consider the effect of this transaction when it considers El Paso's request to recover Order No. 636 stranded investment costs in future Section 4 rate proceedings.

D. *Competition*

New Mexico, PG&E, and SoCal question the extent to which competition exists in the gathering business in all three supply basins served by El Paso. New Mexico believes that El Paso and Field Services should make a prior showing that sufficient competition exists in the related production areas so that the Commission and all interested parties may rely upon market-based prices in lieu of cost-of-service regulation to assure a just and reasonable result. Indicated Shippers argue that the Commission should determine the level of competition

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[26] *See, e.g., Equitrans, Inc.*, 64 F.E.R.C. (CCH) ¶ 61,374 (1993); *KN Energy, Inc. and KN Interstate Gas Transmission Company*, 65 F.E.R.C. (CCH) ¶ 61,168 (1993); and *Mid Louisiana Gas Company and Fairbanks Gathering Company*, 65 F.E.R.C. (CCH) ¶ 61,166 (1993).

[27] *Id.*

for gathering services in El Paso's production area if the Commission does not continue to regulate El Paso's and Field Services' rates, terms, and conditions of service.

Commission Response

We will deny the requests to determine the level of competition for gathering services in El Paso's production area. The arguments imply that the Commission should regulate the gathering rate if there is no competition for gathering services. As we have stated in response to similar arguments, the existence or absence of competition for gathering in an area is irrelevant to whether or not the Commission will regulate an affiliated gatherer's rates. Under the NGA, the Commission has no authority to regulate a gatherer's rates or its terms and conditions since a gatherer is not a natural gas company.

However, the existence of competition for gathering services is not the only way to protect a pipeline's existing customers from an arbitrary termination of their gathering service, discrimination or abuse. Before approving spin-downs and spin-offs, we have required certain conditions to assure that existing pipeline gathering customers will be able to continue to receive gathering service from a pipeline's successor-in-interest for a reasonable transitional period under rates, terms and conditions consistent with those under which the pipeline provided for gathering service. In response to those conditions, El Paso filed a default contract, discussed below, which, with certain modifications, accomplishes these goals.

Further, where an affiliate is involved, the Commission has complaint procedures providing gathering customers a form in which to raise issues of abuse or discrimination caused by an affiliate and its pipeline acting in concert. We address these concerns in the next section.

E. *Regulation of Affiliated Gatherers*

IPAA and NGC state that they are opposed to effective deregulation and light-handed regulation of existing certificated pipeline gathering systems. IPAA states that permitting a pipeline to transfer previously regulated gathering facilities to a pipeline affiliate raises too many opportunities for abuse of market power and threatens the purpose underlying Order No. 636. IPAA further indicates that traditional NGA regulation of such interstate pipeline and affiliate-owned facilities is required and necessary to protect against monopoly abuse.

GPM and Phillips request that the Commision require El Paso to provide reasonable assurances that any potential affiliate abuse concerns will be effectively prevented as a condition of approval of the application by, for example, affiliate reporting requirements similar to those found in Order No. 497 [F.E.R.C. Stats. and Regs., Regulations Preambles 1986-1990 ¶ 30,820]. SoCal contends that a limited reporting or some other continuing Commission regulation may be necessary to prevent discrimination and exertion of market power by Field Services and/or El Paso. New Mexico also expresses concern as to El Paso's and Field Services' assurances of nondiscriminatory services and the appropriate means of identifying any deviations from such assurances.

Commission Response

To guard against the risk of affiliate abuse, and to ensure an arms length relationship between the pipeline and its affiliated gathering company, the Commission requires the pipeline to include certain standards in its tariff.[28] Accordingly, we will

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[28] *See e.g., Arkla*, 67 F.E.R.C. (CCH) ¶ 61,257 (1994).

condition the abandonment authorization discussed below upon El Paso's filing tariff provisions containing the following standards of conduct:

(a) El Paso will provide nondiscriminatory access to all sources of supply in accordance with Part 284 of the Commission's regulations and will not give shippers of its gathering affiliate undue preference over shippers of nonaffiliated gatherers or other customers in scheduling, transportation, storage or curtailment priority.

(b) El Paso will not condition or tie its agreement to provide transportation service to an agreement by the producer, customer, end-user, or shipper relating to any service by any gathering affiliate, any services by it on behalf of its gathering affiliate, or any services in which its gathering affiliate is involved.

Although the Commission can require El Paso to include these standards of conduct in its tariff, the Commission cannot require Field Services to do so. The Commission does not have jurisdiction over companies such as Field Services that perform only a gathering function. These companies, including those affiliated with an interstate pipeline, are not natural gas companies because they neither transport natural gas in interstate commerce, nor sell such gas in interstate commerce for resale. Nevertheless, the Commission can exert control over the gathering activities of affiliated gatherers in particular circumstances where such action is necessary to accomplish the Commission's policies for the transportation of natural gas in interstate commerce.[29] If an affiliated gatherer acts in concert with its pipeline affiliate in connection with the transportation

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[29] *Arkla I*, 67 F.E.R.C. (CCH) ¶ 61,257 (1994).

of gas in interstate commerce and in a manner that frustrates the Commission's effective regulation of the interstate pipeline, the Commission may look through, or disregard, the separate corporate structures and treat the pipeline and gatherer as a single entity, *i.e.*, a single natural gas company. In so doing, the Commission would regulate the gathering activities as it would if the gathering facilities were owned directly by an interstate pipeline.

F. *Rates*

SoCal is concerned that the rate benefits associated with the full unbundling of the El Paso system will accrue exclusively to El Paso. It contends that, under the current rates, SoCal and other mainline transmission customers are subsidizing the rate for gathering over a phase-out period that the Commission has approved as part of a global settlement. El Paso is proposing that upon the termination of the phase-out period, all facilities subject to the phase-out will be transferred to Field Services. Field Services, SoCal submits, may then charge whatever rate the market will bear. Therefore, El Paso could, through its Field Service affiliate, earn a return in excess of any authorized return, effectively allowing it to recover the cost of these facilities once from the regulated ratepayer and again in the deregulated market.

GPM and Phillips contend that El Paso should be required to offer any remaining gathering services at rates that reflect full unbundling. They argue that if any gathering facilities are not transferred to Field Services, the costs for such facilities should not be included in El Paso's transmission costs.

Southwest Gas requests in its intervention that certain conditions be placed on any authorization granted in this

proceeding. Southwest Gas contends that the appropriate rate treatment to be afforded to El Paso's transfer of its gathering facilities should be subject to the Commission's final decision on this issue in Docket No. RM94-4-000. Second, El Paso should be required to reflect the proposed refunctionalization of all of the net plant in jurisdictional rates. Third, El Paso should be required to remove the transferred facilities from its rates simultaneously with the proposed effective date of the plant refunctionalization of January 1, 1996. Finally, in order to avoid any deterioration of the quality of El Paso's existing firm transportation services, El Paso must acknowledge that receipt points physically located on facilities to be transferred to Field Services will be moved to the closest interconnection between Field Services' gathering facilities and El Paso's interstate transmission system.

Indicated Shippers argue that the impact of the proposed spin-down on El Paso's rates, as well as questions regarding the allocation of costs and the corporate relationships among El Paso, Field Services and El Paso Gas Marketing Company, should be addressed in a full evidentiary hearing. Southwest Gas and Arizona Directs argue that the Commission should address the costs underlying El Paso's jurisdictional rates.

El Paso and Field Services contend that because they intend to coordinate the transfer of the facilities in question with the provisions of the settlement and because El Paso must file new rates to be effective no later than January 1, 1996, the parties to these proceedings will have ample opportunity to raise such issues in the new rate case to the extent the transfer raises any issues that could impact the level of its jurisdictional rates. El Paso and Field Services state that the rate case will provide the appropriate forum for any rate issues arising from the transfer.

Commission Response

In response to the various concerns about the impact of the facility transfer on El Paso's rates, we note that El Paso filed a general rate case in Docket No.RP95-363-000 in which it proposed to reduce its transmission plant by $ 54.8 million, and its associated reserve for depreciation of $ 41.1 million. In an order issued July 26, 1995, the Commission accepted and suspended the rate change for five months and indicated that the rate aspects of the refunctionalization of facilities are an issue for hearing in the rate case. Although we have determined in this section 7 proceeding that El Paso's proposed refunctionalization is proper, the Commission determines the rate effects of refunctionalization in a section 4 proceeding. Therefore, the rate proceeding in Docket No. RP95-363-000 is the appropriate forum in which to examine the rate issues raised by the parties in this proceeding.

G. *Continuity of Service*

Amoco and the Indicated Shippers argue that the Commission should not authorize the abandonment of any production area services absent a guarantee that El Paso and Field Services will continue to honor the rates, terms, and conditions of existing contractual obligations. The Indicated Shippers further contend that the Commission should condition any abandonment requested by El Paso on the continuation of full regulation over the rates, terms and conditions of production area services performed by Field Services.

Llano believes that this proceeding may not be the appropriate forum for El Paso's proposed changes to its general terms and conditions. They express particular concern regarding imbalance issues. SoCal questions whether the spin-down will have any impact on existing firm gas purchase or

transportation arrangements of pre-existing firm shippers. SoCal also questions whether the abandonment should be conditioned to provide that former sales customers have an opportunity to renegotiate agreements to free them from demand charges that tie them to particular supply areas and gathering systems currently operated by the pipeline, but which are now proposed to be transferred to Field Services. SoCal states that Field Services could have locked-in customers without regard to the quality or cost of service provided.

Commission Response

The Commission has addressed the continuity of gathering service issues raised by these parties in recent orders.[30] In *Arkla I*, the Commission provided that in the event the pipeline's successor was not able to negotiate agreements with existing shippers for continued service, the pipeline would be required to submit for Commission approval a default contract, including rates, terms and other conditions of service. Arkla was also required to submit tariff sheets establishing additional standards of conduct to further assure non-discriminatory conduct. In *Arkla II*, the Commission provided that the default contract contain (1) a minimum term of two years, (2) a rate the pipeline is currently charging for similar service, with rate escalations permitted if a statement explaining any rate escalator is included, and (3) terms and conditions consistent with those included in the contracts between the pipeline gatherer and the customers who will be parties to the default contract. *Arkla II* also provides that the pipeline must make a section 4 filing before terminating any gathering service. We discuss the default contract filed in this proceeding below.

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[30] *Arkla I*, 67 F.E.R.C. (CCH) ¶ 61,257 (1994); *Arkla Gathering Services Co. (Arkla II)*, 69 F.E.R.C. (CCH) ¶ 61,280; *Mid Louisiana Gas Co. and Fairbanks Gathering Co.*, 67 F.E.R.C. (CCH) ¶ 61,255 (1994).

H. *Default Contract*

1. *Contract Term*

Assuming abandonment authorization is received by El Paso prior to January 1, 1996, Field Services will offer existing El Paso gathering customers a default contract with a term of two years commencing January 1, 1996, unless Field Services and shipper mutually agree to a shorter term, beginning on that date.

2. *Rates*

Unless Field Services and a shipper agree otherwise, for calendar year 1996, Field Services will charge $ 0.19 per dth for gathering service under the default contract as agreed upon in the settlement.[31] For production area services, Field Services will charge rates under the default contract equal to the 1995 rates for such services as set forth in El Paso's FERC Gas Tariff, which rates are also equal to the production area services rates for 1996 agreed upon in the settlement. Effective January 1, 1997, the 1996 maximum rates will be increased by an escalator equal to the percentage change in the cumulative implicit Gross Domestic Product - Implicit Price Deflator (GDP-IPD) computed and published by the Department of Commerce for the most recent twelve (12) months prior to January 1, 1997.

The default contract also provides that Field Services will honor any discount that El Paso has negotiated with its existing customers for the agreed upon term of the discount and subject to any applicable conditions of such discount. In the event the term of the discount expires prior to the expiration of the

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[31] 63 F.E.R.C. (CCH) ¶ 61,139 (1993).

default contract, the effective rate(s) during the remaining term of the default contract will not exceed the maximum rate(s) listed therein, plus the rate escalator. The proposed default contract also provides that Field Services will not offer discounts to an affiliate on a preferential basis.

3. *Processing*

Field Services plans to construct new cryogenic natural gas processing facilities at its Chaco, New Mexico plant, to become operational after January 1, 1996, but during the two-year term of the default contract. Field Services states that, because such facilities will use a different recovery method from existing facilities and involve a completely different level of investment and costs, El Paso's tariff rate will not be appropriate for processing services at the new facilities. Accordingly, Field Services indicates, the default contract provides that (1) products extraction services will rely on plants or facilities where El Paso provided such service prior to the effective date of the default contract, and (2) the natural gas liquids and associated fuel and shrinkage allocable to each shipper after the construction of a new plant or expansion of an existing plant will be the liquids and associated fuel and shrinkage that would have been allocable to the shipper had such new plant or expansion not been constructed. Field Services states that any shipper receiving service under a default contract may negotiate a rate for service that relies on new facilities, but if the shipper elects not to do so, the proposed provision will ensure that any processing arrangements that may become effective at a new or expanded plant during the two-year term of the default contract will not adversely affect the default shippers' rates or service.

4. *Terms and Conditions*

The default contract incorporates by reference the applicable general terms and conditions of El Paso's Volume No. 1-A Tariff as of December 31, 1995, with certain limited modifications. Thus, Field Services indicates that the terms and conditions of service between Field Services and the default shipper will be identical with those the shipper has under its existing gathering agreement with El Paso, with the following exceptions.

a. *Scheduling and Capacity Allocation*

A shipper desiring transportation on Field Services' gathering system will be scheduling separately with Field Services rather than El Paso. In this connection, Field Services intends to implement the same procedures for nomination and confirmation of service that are contained in El Paso's tariff, but such procedures will apply independently of those on the mainline.

Because of the complete separation of field services from mainline transportation, however, it will no longer be proper for Field Services to allocate capacity, in the event of field constraints, on the basis of the shippers' capacity rights on the mainline. Therefore, Field Services has developed an alternate capacity allocation procedure that is substantially similar to the capacity application procedures contained in El Paso's tariff but which applies strictly within the gathering system. Field Services indicates that available capacity should be adequate to accomodate all tendered volumes. However, in the event of a curtailment of service, Field Services has assigned a higher priority of service to those shippers which have negotiated contracts providing that all gas produced by those shippers will be dedicated to Field Services' system for gathering and

processing services. Field Services will curtail all other volumes, including those under the default contract, first.

b. *Penalties*

El Paso points out that the Commission has held that a pipeline and the successor-in-interest to its gathering system may not charge two penalties for transactions across gathering and transmission facilities that qualified for a single penalty prior to the transfer. El Paso indicates that on its system shippers typically use two agreements to transport gas from the wellhead to market, a field agreement and a mainline agreement, both of which are subject separately to the penalty provisions of El Paso's tariff. El Paso states that amounts generated by penalties assessed by El Paso, whether to mainline shippers or field shippers, have been credited pro rata to shippers on El Paso's mainline system. El Paso asserts that under the terms and conditions of the default contract, shippers will experience no change in their exposure to penalties.

Because service on Field Services facilities will be independent of service on El Paso's mainline facilities, it will not be appropriate to credit penalty amounts assessed against gathering customers to mainline shippers. Field Services proposes that any amounts generated by assessment of penalties under default contracts be credited to gathering shippers with default contracts on a pro rata basis by comparing the default shipper's gathering charges to the total default contract gathering charges in the applicable basin.

5. *Intervenors Opposed to the Default Contract*

Indicated Shippers, New Mexico, and Pro filed protests to the default contract and El Paso's request for expedited action. Among other things, they argue that the default contract is

premature since the Commission has yet to rule on the abandonment application. Pro contends that consideration of El Paso's default contract is premature because, contrary to El Paso's representations, it has not made a good faith effort to negotiate individual contracts with shippers.[32]

In its answer, El Paso responds that submission of the default contract is not premature, and its request for expedited consideration in this proceeding is reasonable and appropriate. El Paso states that Field Services has spent much time and effort to contact and initiate negotiations with El Paso's existing customers, yet the majority of them have not yet contracted with Field Services for continued service after the spin-down.

Indicated Shippers raises concerns regarding (1) the proposed GDP-IPD escalator, (2) the lower priority for default gas, and (3) the potential for double penalties or discriminatory penalties.

First, Indicated Shippers object to use of the GDP-IPD index as a rate escalator. They note that in Order No. 561[33] the Commission stated that the GDP-IPD has flaws, both as a measure of general inflation and as a contractual price escalator. Indicated Shippers recommend that the Commission require

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[32] Pro requests that its pleading be considered a motion to intervene out of time if the Commission does not issue a notice regarding the filing of the default contract in Docket No. CP94-183-001. Since Pro filed a motion to intervene in Docket No. CP94-183-000, Pro need not move to intervene in the default contract subdocket.

[33] Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992, Order No. 561, 58 Fed. Reg. 58,753 (November 4, 1993), III F.E.R.C. Stats. & Regs. 30,985 (October 22, 1993), *order on reh'g*, Order No. 561-A, 59 Fed. Reg. 40,243 (August 8, 1994), III F.E.R.C. Stats. & Regs. 31,000 (July 28, 1994).

Field Services to use the Producer Price Index for Finished Goods (PPI-FG) with a 1 percent productivity factor, or at a minimum, require a productivity offset.

El Paso contends that the PPI-FG index for use as an adjustment factor proposed by Indicated Shippers is inappropriate for use in a gathering service contract because the price of services is not considered in calculating such an index.

Second, Indicated Shippers contend that El Paso has provided no justification for its proposal that customers who are subject to the default contract will have the lowest priority on the system. Pro also objects to this provision. Indicated Shippers state that this is inconsistent with the *Arkla* doctrine that requires existing pipeline tariff terms and conditions of service to be applicable. Under the current system, gathering priority is determined by downstream mainline priority and Indicated Shippers argue that this should continue as part of the default contract terms.

El Paso states that the allocation procedures do not disadvantage default shippers in comparison to the rights they have today. El Paso maintains that its current field customers have priority rights that are interruptible and that are subject to the superior rights of firm shippers on the mainline. Field Services' shippers will have priority rights that are also interruptible and will be subject to the superior rights of other shippers who have dedicated their gas to Field Services. El Paso argues that the proposed capacity allocation procedures is a reasonable response to those shippers whose only access to transmission pipelines is through Field Services' field facilities.

Finally, the default contract proposes imbalance penalties. Indicated Shippers state that the Commission has found that there could not be double penalties on the gathering system and

the mainline system for the same haul that previously qualified for only one penalty. This, submits Indicated Shippers, must be clarified in the default contract and penalties should not be imposed on an unduly discriminatory basis.

In response to the concerns about double penalties, El Paso confirms that the possibility of Field Services' shippers experiencing two penalties for a transaction involving both gathering and mainline transportation is non-existent. El Paso notes the sections of its tariff (Original Sheet Nos. 261 and 276 of its tariff, Second Revised Volume No. 1-A) that provides for the resolution of imbalances exempt from their coverage "any operator of interconnecting facilities." El Paso points out that, since Field Services will be the operator of a facility interconnecting with the El Paso mainline, no penalties will be assessed by El Paso for gas delivered to it by Field Services. Therefore, El Paso concludes that the only penalty that a Field Services shipper could incur would be a penalty assessed by Field Services.

New Mexico expresses concern regarding El Paso's reference to Field Services' plan to construct new cryogenic natural gas processing facilities at its Chaco, New Mexico plant. New Mexico notes that El Paso states that its tariff rate will not be appropriate for processing services at such new facilities because such facilities will use a different recovery method from existing facilities and involve a completely different level of investment and costs. New Mexico also notes that El Paso's current tariff provides for the assessment and use of actual rates for fuel and shrinkage but the default contract suggests that shippers will receive only the natural gas liquids that would have been allocable to the shippers if new facilities had not been constructed. New Mexico asserts that at a minimum, conforming changes to El Paso's tariff may be necessary to accomplish the stated intent under the Field Services default

contract and that further clarification of the allocation procedures at issue is appropriate before the proposed default contract is approved.

Pro also expresses concern as to the allocation of NGLs pursuant to the default contract. It argues that due to the much greater efficiency of the new Chaco cryogenic plant there should be a greater yield of NGLs delivered to the owners than is currently the case with the much less efficient old Chaco lean-oil plant. Pro believes that consideration of El Paso's default contract seeks to have the Commission intrude into a subject matter of state common law over which it has no jurisdiction, that is, over the respective property rights and contract rights between producers/shippers and El Paso concerning natural gas liquids (NGLs).

Pro maintains that language in the default contract (*i.e.*, Paragraph 3) would govern the producer/shippers' rights to NGLs, an area beyond the Commission's jurisdiction. Pro speculates that El Paso may be inviting intrusion by the Commission in this area to provide a possible shield against anticipated state law claims. Pro contends that this provision amounts to a charter for the misappropriation of NGL's of producer/shippers in the San Juan Basin.

In response, El Paso clarifies that those shippers who negotiate contracts with Field Services that meet their own particular needs for service after January 1, 1996, will be subject only to the rates, terms, and conditions of service set forth in those contracts. El Paso's tariff will have no relevance to field services for those shippers. On the other hand, El Paso states, default contract shippers will be subject to a contract which substantially incorporates the relevant rates, terms, and conditions of El Paso's tariff prior to the transfer of the facilities. Because El Paso does not and will not have a

products extraction rate in its tariff that includes the cost of service of the new cryogenic plant, and because the terms and conditions relevant to products extraction service, which provide for actual fuel and shrinkage, were drafted with only the existing plants in mind, Field Services has structured its default contract to treat the default shipper as if the new cryogenic plant were not being built.

El Paso further states that although some of the default shippers' gas may physically flow to the new cryogenic plant, default shippers will experience the shrinkage, liquids recoveries, and products extraction rate they do today at the existing Chaco lean oil products extraction plant. Field Services will determine liquids recovery for default shippers by calculating lean oil equivalent gallons based on the most recent 12-month average lean oil efficiency factors. Default shippers will be kept whole on any difference between the shrinkage incurred at the new plant and the calculated shrinkage using the lean oil efficiency factors as if the gas had been processed at the existing plant. Only those shippers who negotiate contracts with Field Services which provide for products extraction at the new cryogenic plant will incur the shrinkage and pay the fee for service at that plant.

Pro also objects to the choice of law provision in the default contract which provides that the laws of the State of Texas shall govern the agreement particularly when Texas law would govern issues of poperty rights in New Mexico and a contract to be performed in New Mexico.

Pro maintains that any gathering rate should be structured in terms of cost of service in a justifying rate case rather than arbitrarily commencing at $ 0.19 per dth and applying the GDP-IPD. Pro states that this is neither an initial rate nor an escalator that bears any reasonable relation to a fair

charge and compensation for an old fully depreciated gathering system in the San Juan Basin.

Commission Response

Indicated Shippers argue that the PPI-FG index is more appropriate than the proposed default contract's GDP-IPD index as an adjustment factor. The Commission has stated that it does not believe that it should use its jurisdiction over an abandonment and change in service to mandate any specific index or productivity offset to be used in a default contract, as Indicated Shippers suggest.[34] In Order No. 561, the Commission picked the PPI-FG index to simplify the way it regulates the rates of oil pipelines over the long term. That index was subject to further Commission review and adjustments. Here, the GDP-IPD index that Field Services chose is part of a two-year contract by a non-jurisdictional entity. Further, the Commission has stated that a default contract may include a reasonable escalator clause.[35] The GDP-IPD meets that test since it is a generally accepted index that measures changes in the economy. Therefore, we will not grant Indicated Shippers' request.

As to Indicated Shippers' concerns regarding double penalties, El Paso has clarified that the possibility of Field Services' shippers experiencing two penalties for a transaction involving both gathering and mainline transportation is non-existent.

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[34] *Arkla Gathering Services Co. and NorAm Gas Transmission Co.*, 71 F.E.R.C. (CCH) ¶ 61,297 (1995).

[35] *NorAm Gas Transmission Co.*, 70 F.E.R.C. (CCH) ¶ 61,018 (1995).

El Paso's clarification regarding the fuel and shrinkage charges associated with Field Services' new cryogenic processing facilities sufficiently address New Mexico's and Pro's concerns. We agree that neither El Paso's tariff nor the default contract needs to be modified in this regard.

Pro's objection that the $ 0.19 gathering rate is arbitrary is without merit. In the settlement, the parties agreed that the gathering rate would not exceed $ 0.19 in 1996 if the Commission approved light-handed regulation of El Paso's gathering facilities and if not, El Paso could file for and collect any gathering rate permitted under the NGA. Under these circumstances, the $ 0.19 rate meets the Commission's goal that the default contract protect the parties' reasonable expectations regarding service from the gatherer.

Further, the Commission intended the default contract to be a transitional mechanism to protect the reasonable expectations of a jurisdictional pipeline's existing customers while they consider their options in an unregulated environment. The default contract is not meant to be a filed rate and is not required to meet the just and reasonable standard that applies to the rates of natural gas companies under NGA sections 4 and 5.[36] The sole purpose of the default contract is to provide a pipeline's existing customers with some minimum protection that their gathering service will not be terminated. The Commission did not envision the default contract as being either the gatherer's or the existing customers' best deal. Rather, the default contract should provide an incentive for the parties to reach a negotiated agreement.

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[36] *See Arkla II*, 69 F.E.R.C. at 61,091-92, n.73.

Pro's objection to the choice of law provision is unfounded. We have required that the default contract contain terms and conditions consistent with those included in the existing contracts between the pipeline gatherer and the customers who will be parties to the default contract. The existing service agreements provide that the laws of the State of Texas shall apply. Since the default contract is consistent with existing contracts as to the choice of law provision, there is no need to modify the default contract. In conclusion, we find that the default contract is consistent with the Commission's requirements imposed in *Arkla II* with two exceptions. First, as discussed above, El Paso should modify the default contract to include a provision providing for firm service to Ignacio. Second, Indicated Shippers and Pro have correctly pointed out that deliveries under the default contract should not have a lower priority than other gathered gas. We find that the default contract, as modified to provide firm service to Ignacio and to remove the discriminatory provision involving the priority accorded deliveries under the default contract, is appropriate. We will condition the abandonment authorization requested by El Paso upon El Paso's modifying its default contract as discussed.

At a hearing held on September 13, 1995, the Commission on its own motion received and made a part of the record in this proceeding all evidence submitted, including the application and exhibits supporting the sought authorizations, and after consideration of the record,

The Commission orders:

(A) Permission for and approval of El Paso's abandonment of the certificated facilities and Special Rate Schedules Z-8, Z-9 and T-14, as more fully described above and in its application, is granted effective January 1, 1996, subject to the conditions

described in this order. El Paso shall advise the Commission of the date of the abandonment within 10 days therof.

(B) El Paso shall file pursuant to section 4 for authorization to terminate its gathering services at lease thirty days prior to the proposed effective date of such authorization.

(C) El Paso shall comply with the requirements of Account 102, Gas Plant Purchased or Sold, and shall submit the required journal entries to record the abandonment by transfer of the facilities.

(D) El Paso shall show cause why it did not include the compressor facility located at the inlet of the Chaco Gasoline Plant among the facilties to be transferred to Field Services.

(E) The abandonment authorization granted in ordering paragraph (A) is conditioned upon El Paso's filing tariff provisions containing the standards of conduct discussed in this order.

(F) The abandonment authorization granted in ordering paragraph (A) is conditioned upon El Paso's showing that Ignacio and Field Services have executed an agreement whereby Field Services will provide service to Ignacio.

(G) The proposed default contract filed by El Paso is accepted, subject to its being revised to incorporate the changes required in this order.

(H) All protests and requests for a hearing or technical conference are denied.

(I) The motions to consolidate this docket with Docket No. CP94-184-000 and to delay action in this proceeding

pending the outcomes in Docket No. RM94-4-000 and in *Williams Gas Processing Company v. FERC* are dismissed as moot.

Appendix A
Intervenors

Amoco Energy Trading Corp., *et al.*
ANR Pipeline Company
Arizona Electric Power Cooperative, Inc.
Arizona Public Service Company, Phelps Dodge Corporation, and Salt River Project Agricultural Improvement and Power District
ARKLA Energy Resources Company
ASARCO, Inc., Cyprus Miami Mining Corporation, and Magma Copper Company
Chevron U.S.A., Inc.
Citizens Utilities Company
Colorado Interstate Gas Company
CONOCO, Inc.
El Paso Electric Company
El Paso Municipal Customer Group
Enron Gas Services Corporation and Enron Access Corporation
Gas Company of New Mexico
GPM Gas Corporation
Independent Petroleum Association of America
Indicated Shippers
Llano, Inc.
Marathon Oil Company
Meridian Oil, Inc.
Mewbourne Oil Company
Mobil Natural Gas, Inc.
Natural Gas Clearinghouse

New Mexico Energy, Minerals and Natural Resources Department and the Commissioner of Public Lands for the State of New Mexico
Northern Natural Gas Company
Pacific Gas and Electric Company
Panhandle Eastern Pipe Line Company
Phillips Petroleum Company and Phillips Gas Marketing Company
Pro New Mexico Inc.
Producer-Marketer Transportation Group Gathering Coalition
Public Service Commission of the State of California
San Diego Gas & Electric Company
Southern California Edison Company
Southern California Gas Company
Southern Union Gas Company
Southwest Gas Corporation
Tennessee Gas Pipeline Company
Texaco Gas Marketing, Inc. and Texaco Exploration and Production Inc.
Town of Ignacio, Colorado
Transok, Inc., Transok Gas Transmission Company and Transok Gas Company
Transwestern Pipeline Company
Union Oil Company of California
Vesta Energy Corporation
Western Gas Resources, Inc.
Williams Field Services Group, Inc.

Appendix B

System (3)	*Length & Diameter*	*Ext. of Facil beyond Cen. Point in Field*	*Geographic Configur-ation*	*Location of Compres-sors & Processing Plants*	*Location of Wells*	*Operating Pressure of Line*
Andarko						
1. Beckham	9.81m 4"-6"p	single pt before NGPL's system	web-like	no compr/proc plant	7 wells	625-900 psig
2. Hobart Ranch	136.76m 2"-16"p	Hobart Ranch Plant	backbone	interconnect of Line 3096 and 30119	106 wells	450-1,000 psig
3. Howe Ranch	33.62m 2"-12"p	no central point	backbone	end of Trunk A before connect/ with Line #30118	37 wells	800-950 psig

System (3)	*Length & Diameter*	*Ext. of Facil beyond Cen. Point in Field*	*Geographic Configur-ation*	*Location of Compres-sors & Processing Plants*	*Location of Wells*	*Operating Pressure of Line*
Andarko						
4. Mills Ranch	68.61m 4"-20"p	no central point	backbone and web-like	dehyd. site near interc. Trunk A Line #3095	13 wells	650-800 psig
5. Roberts County	1.78m 2"-4"p	no central point	short length pipelines	no compr. proc. plant.	13 wells	control. by Trans-western
6. South Zybach	406.16m 2"-20"p	no true central point	backbone and web-like	interconnect of Lateral C-1 and Trunk C; C-Loop	289 wells	300-1,000 psig

System (3)	*Length & Diameter*	*Ext. of Facil beyond Cen. Point in Field*	*Geographic Configur-ation*	*Location of Compres-sors & Processing Plants*	*Location of Wells*	*Operating Pressure of Line*
Permian						
1. Carlsbad Line	29.82m 2"-8"p	no central point	backbone	3 dehyd. sites	24 wells	325-500 psig
2. Eddy County	38.66m 2"-8"p	no central point	backbone	4 well-head dehydrators	29 wells	500-750 psig
3. South Carlsbad	664.79m 2"-12"p	possibly two central points central point	intricate backbone and web-like	Compr. at point Trunk A where Trunk B and Line #3191 con.	491 wells	250-500 psig
4. Gomez	28.12 m 4"-24"p	no central point	web-like	no compr. or proc. plant	46 wells	180-210 psig

System (3)	*Length & Diameter*	*Ext. of Facil beyond Cen. Point in Field*	*Geographic Configur-ation*	*Location of Compres-sors & Processing Plants*	*Location of Wells*	*Operating Pressure of Line*
Permian						
5. Hamon	3.03m 6"-16"p	no central point	a simple one well line structure	Harmon-Toro Compr. and Dehy. at end of line	1 well	75-100 psig
6. Hay Hollow	3.06m 4"-6"p	no central point	backbone	no field compression or processing plant	4 wells	305-500 psig

System (3)	*Length & Diameter*	*Ext. of Facil beyond Cen. Point in Field*	*Geographic Configur-ation*	*Location of Compres-sors & Processing Plants*	*Location of Wells*	*Operating Pressure of Line*
Permian						
7. Linterna Line	10.37m 4"-8"p	no central point	simple backbone	behind the Hamon-Toro Compr. and Dehy. Site at end of Line #3175	13 wells	75-100 psig
8.Lockridge	12.39m 4"-20"p	no central point	backbone	Lockridge Fld. compr. on Line 3174 N. Waha. Pl.	12 wells	75-100 psig

System (3)	*Length & Diameter*	*Ext. of Facil beyond Cen. Point in Field*	*Geographic Configur-ation*	*Location of Compres-sors & Processing Plants*	*Location of Wells*	*Operating Pressure of Line*
Permian						
9. McKay Creek	21.74m 4"-6"p	where Lat. A-1 & A-2 intersect Trunk A	Short laterals and well-tie lines	Field Unit 101 at interconnect of Trunk A & lat. lines A-1 and A-2.	4 wells	600-700 psig
10. Rojo Caballo	0.98m 4"-6"p	no central point	backbone	no compr. or proc. plant	8 wells	180-210 psig
11. Toro	9.54m 4"-16"p	no central point	backbone	behind the Hamon-Toro compr. and Dehyd. Site at end of Line #3175	8 wells	180-210 psig

System (3)	*Length & Diameter*	*Ext. of Facil beyond Cen. Point in Field*	*Geographic Configur-ation*	*Location of Compres-sors & Processing Plants*	*Location of Wells*	*Operating Pressure of Line*
Permian						
12. Verhal-en	12.78m 4"-8"p	gas is gathered into the trunk line which connects to the Linterna Gathering System Trunk A	single line tying directly into the Linterna Trunk A	behind the Hamon-Toro Compr. and Dehyd. Site	1 well	75-100 psig

System (3)	*Length & Diameter*	*Ext. of Facil beyond Cen. Point in Field*	*Geographic Configur-ation*	*Location of Compres-sors & Processing Plants*	*Location of Wells*	*Operating Pressure of Line*
Permian						
13. West Waha	4.88m 4"-12"p	no true central point	backbone	behind the Hamon-Toro Compr. and Dehyd. Site at end of Trunk A.	6 wells	75-100 psig
14.Wor-sham	8.57m 4"-12"p	no central point	web-like	no field compr. or dehyd. plant	14 wells	180-210 psig

System (3)	*Length & Diameter*	*Ext. of Facil beyond Cen. Point in Field*	*Geographic Configur-ation*	*Location of Compres-sors & Processing Plants*	*Location of Wells*	*Operating Pressure of Line*
San Juan						
1. Angel Peak	1039.08m 2"-20"p	no central point	web-like	2 field compr. Angel Peak and Lindridth	2,182 wells	120-190 psig
2. Bisti	176.76m 2"-20"p	no central point	web-like	4 compr. sta. Bisti #1, 6, 8, 9	335 wells	15-80 psig

System (3)	*Length & Diameter*	*Ext. of Facil beyond Cen. Point in Field*	*Geographic Configur-ation*	*Location of Compres-sors & Processing Plants*	*Location of Wells*	*Operating Pressure of Line*
San Juan						
3. Blanco	2,216m 2"-30"p	no central point	web-like	2 field compr. 3B-1 & Largo Hamon-Toro Compr. and Dehydr. Site at end of Trunk A.	5,450 wells	165-325 psig
4. Blanco-Fruitland	22.05m 2"-4"p	no central point	backbone and web-like	no field compr. or dehyd. plant	68 wells	180-250 psig

System (3)	*Length & Diameter*	*Ext. of Facil beyond Cen. Point in Field*	*Geographic Configur-ation*	*Location of Compres-sors & Processing Plants*	*Location of Wells*	*Operating Pressure of Line*
San Juan						
5. Chaco	623.70m 2"-24"p	no central point	web-like	Amoco Gallegos Canyon Field compr. on Lat. 6B-14	1,132 wells	160-410 psig
6. Ignacoi	180.82m 2"-34"p	gas is gathered from the wells through well-tie lines, lateral lines and trunk line	backbone	no compr. or process. plant.	281 wells	330-475 psig

System (3)	*Length & Diameter*	*Ext. of Facil beyond Cen. Point in Field*	*Geographic Configur-ation*	*Location of Compres-sors & Processing Plants*	*Location of Wells*	*Operating Pressure of Line*
San Juan						
7. Kutz	518.32m 2"-20"p	no central point	backbone along trunkline and web-like for lateral and well-tie	Kutz field compress. San Juan Package Compr.	1,135 wells	75-100 psig
8. Twin Mounds	17.65m 2"-16"p	no central point	web-like	no compr. or processing plant.	207 wells	180-370 psig
9. North-west	87.23m 2"-16"p	no central point	web-like	no field compr. or dehyd. plant	176 wells	80-370 psig

APPENDIX C

El Paso Natural Gas Company
73 F.E.R.C. (CCH) ¶ 61,224 (1995)

El Paso Natural Gas Company
Docket No. CP94-183-002

FEDERAL ENERGY REGULATORY COMMISSION

Order Denying Clarification and Rehearing

November 29, 1995

Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, James J. Hoecker, William L. Massey, and Donald F. Santa, Jr.

On September 13, 1995, the Commission issued an order authorizing El Paso Natural Gas Company (El Paso) to abandon its gathering facilities and transfer them to its affiliate, El Paso Field Services Company (Field Services).[1] El Paso, Indicated Shippers,[2] the Undersigned Parties,[3] and New Mexico Energy, Minerals and Natural Resources Department and the Commissioner for Public Lands for the State of New Mexico

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[1] *El Paso Natural Gas Company*, 72 F.E.R.C. (CCH) ¶ 61,220 (1995).

[2] Chevron U.S.A. Inc., Conoco Inc., Marathon Oil Co., Mobil Natural Gas Inc., Texaco Inc. and Texaco Natural Gas Inc., Union Oil Company of California.

[3] Pacific Gas and Electric Co., Southern California Gas Co., and Southern Union Gas Co.

(New Mexico) filed timely requests for rehearing of the Commission's September 13 order. El Paso also filed a request for clarification of the order.

For the reasons discussed below, we will deny El Paso's request for clarification and the requests for rehearing.

I. Background

In the September 13 order, the Commission determined that certain of El Paso's currently certificated facilities perform primarily a gathering function and granted El Paso's request to abandon those facilities by transfer to Field Services. The abandonment was conditioned on El Paso's showing that the Town of Ignacio, Colorado (Ignacio) and Field Services have executed an agreement whereby Field Services will provide transportation service to Ignacio. Ignacio currently receives transportation service from El Paso through facilities that El Paso intends to transfer to Field Services. The order also required that the proposed default contract be modified to remove a provision that accords default shippers a lower priority right than shippers who dedicate their gas to Field Services.[4]

II. The Rehearing Requests

Indicated Shippers argue that the September 13 order erred in four ways: first, in determining that the gathering rates, terms and conditions of service, and the gathering facilities to be acquired by Field Services will not be subject to the

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[4] The September 13 order also required El Paso to show cause why it had not included compression facilities located at its Chaco Plant among the gathering facilities to be transferred to Field Services. The Commission will address this issue in a subsequent order.

Commission's jurisdiction; second, in not setting El Paso's abandonment application for evidentiary hearing to evaluate whether there are sufficient competitive alternatives; third, in permitting Field Services to perform transportation service for Ignacio on a non-jurisdictional basis; and fourth, in conditioning El Paso's abandonment in an unduly discriminatory manner by requiring a mutually agreeable replacement contract for Ignacio, a distribution customer, but not for gathering customers.

Indicated Shippers argue that certificated facilities and services do not become non-jurisdictional by virtue of a transfer to an affiliate. They cite *Northern Natural Gas Co. v. FERC* (*Northern*)[5] for the proposition that the Commission has jurisdiction over pipeline affiliate gathering services. They argue that *Northern* should be controlling under the circumstances of this case.

Indicated Shippers also maintain that the Commission's standard for asserting jurisdiction over affiliated gatherers due to affiliate abuse, *i.e.*, when the Commission's effective regulation of the pipeline is frustrated, is vague. Therefore, they submit, the Commission should impose reporting requirements so that there will be a means of knowing when a complaint of affiliate abuse rises to the level justifying Commission intervention.

Indicated Shippers argue that Field Services cannot provide interstate transportation service to Ignacio on a non-jurisdictional basis without violating NGA section 1(b) that subjects interstate transportation to Commission jurisdiction. They argue that Ignacio's service is currently provided under a jurisdictional transportation contract with El Paso and thus

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[5] 929 F.2d 1261 (8th Cir.), *cert. denied*, 112 S. Ct. 169 (1991).

cannot be provided on a non-jurisdictional basis by Field Services.

Further, Indicated Shippers argue that it is inconsistent for the Commission to hold, on one hand, that El Paso must continue to provide service to Ignacio under its tariff if there is no agreement between Ignacio and Field Services and, on the other hand, that if there is agreement the service can be provided on a non-jurisdictional basis by Field Services. The existence of mutual agreement to a contract, they contend, does not alter the underlying jurisdictional status of the service to Ignacio.

The Undersigned Parties submit that it was error to authorize the abandonment and transfer of facilities without examining the issue of competition. New Mexico submits that had the Commission examined the issue of competition on El Paso's gathering system, it either would have denied El Paso's abandonment application, asserted continuing jurisdiction over the gathering facilities or, at a minimum, preconditioned the abandonment on a default contract that offers existing customers greater protection than the one the Commission accepted in the September 13 order.

The Undersigned Parties also argue that the Commission should not have ruled on a specific amount for the net book value of the facilities being transferred ($221,296,764) without giving intervenors an opportunity for discovery in an evidentiary hearing or, at least, a technical conference on the issue.

El Paso seeks rehearing of the Commission's requirement that El Paso modify the default contract to remove the provision involving the priority Field Services will accord deliveries under the default contract. El Paso states that all of its current gathering agreements are interruptible. However, El Paso

explains, when a shipper seeks to schedule a wellhead receipt and a mainline delivery by using a gathering agreement coupled with a mainline transportation service agreement, the priority under the transportation service agreement, either firm or interruptible, determines how the gas is scheduled through both the gathering facilities and the mainline facilities in times of capacity curtailment. Thus, during a period of capacity curtailment, a shipper with the standard interruptible gathering agreement would receive firm service for its entire transaction if the shipper's transportation agreement is for firm service. On the other hand, gathering service for a transaction also involving service under an interruptible transportation service agreement would remain interruptible in times of capacity allocation. El Paso argues that the quality of service under its gathering agreements must be considered interruptible because, standing alone, they provide no assurance of service in times of capacity shortage.

El Paso submits that Field Services cannot follow El Paso's capacity allocation procedures because Field Services is a nonjurisdictional gatherer and thus cannot tie field priorities to interstate transportation rights. Instead, Field Services proposes that a customer willing to dedicate all or a large portion of its production for gathering and production area services exclusively on Field Services' facilities will have priority over nondedicating customers.

El Paso contends that the Commission's rationale, that failure to include default contract shippers within the same capacity allocation category as dedicated shippers is discriminatory, is contrary to Commission precedent and the facts. The issue, according to El Paso, is not whether a

difference in treatment between default and dedicating shippers is discriminatory but whether it is unduly discriminatory.[6]

El Paso also argues that Field Services' proposed capacity allocation priority for default contract shippers is consistent with the interruptible priority currently afforded El Paso's gathering shippers. El Paso maintains that the Commission's requirement that Field Services accord default shippers priority equal to dedicating shippers would entitle default shippers to a service priority superior to the rights those shippers have today under El Paso's agreements and tariff.

III. El Paso's Clarification Request

El Paso seeks clarification of the September 13 order's statements regarding service to Ignacio. El Paso interprets the order as conditioning its abandonment authorization on either (1) Field Services' and Ignacio's execution, prior to January 1, 1996, a negotiated service agreement and formal notification to the Commission of the contract or (2) El Paso's filing a revised default contract providing for continued firm service to Ignacio. If El Paso's interpretation is not the Commission's intent, El Paso seeks rehearing on the issue.

IV. Discussion

A. *Rehearing Requests*

1. *Jurisdiction Over Affiliated Gatherers*

Indicated Shippers' reliance on *Northern* to bolster its argument that the Commission has jurisdiction over affiliated

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[6] *Citing* NGA section 4(b).

gatherers is misplaced. The *Northern* decision established that the Commission has jurisdiction to ensure that rates charged for transportation on the pipeline's own gathering facilities performed in connection with jurisdictional interstate transportation are just, reasonable, and not unduly discriminatory or preferential. The Indicated Shippers point to the court's statement in *Northern* that "as used herein, the expression 'gathering facilities owned by the pipeline' and all substantially similar expressions are intended to include such facilities owned or operated directly or indirectly by a pipeline or its parent, affiliate, subsidiary or lessors."[7] This statement must be read in the context of the entire decision, which addresses the Commission's jurisdiction to regulate gathering services provided in connection with the transportation of natural gas subject to the Commission's jurisdiction.

The *Northern* court did not conclude that affiliated gatherers' services necessarily are provided in connection with the services of their affiliated pipelines. Nor did the *Northern* court conclude that affiliated gatherers are subject to the Commission's jurisdiction solely by reason of their pipeline affiliation. A gathering affiliate such as Field Services that neither transports natural gas in interstate commerce, nor makes jurisdictional sales, is not a natural-gas company under the NGA, and thus does not, in the normal course of business, provide gathering services in connection with jurisdictional transportation.

Indicated Shippers contend that the Commission should impose reporting requirements on affiliate gatherers' transactions. Indicated Shippers argue that such reporting requirements are needed because our standard for asserting

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[7] *Northern*, 929 F.2d 1261 at 1263 n.2.

jurisdiction over affiliated gatherers upon a showing of affiliate abuse is vague. However, we have described in other spin-down cases specific examples of the types of affiliate abuse that would trigger the Commission's authority to exert control over the gathering activities of affiliated gatherers.[8] They are limited to abuses arising specifically from the interrelationship between the pipeline and its affiliate. A complainant before the Commission would have to allege that the pipeline would benefit by certain actions taken by the affiliate in conjunction with its affiliated pipeline. Examples include an affiliate's giving preferences to market affiliate gas or tying gathering service to the pipeline's jurisdictional transmission service; the pipeline's giving transportation discounts only to those utilizing the affiliate's gathering service; and actions resulting in cross-subsidization between the affiliate's gathering rates and the pipeline's transmission rates.

2. *Competition*

We will deny Indicated Shippers', New Mexico's, and the Undersigned Parties' requests for rehearing regarding the issue of competition on El Paso's gathering system. Their arguments have been addressed by the Commission in several orders in recent gathering spin-down and spin-off cases[9] and in our September 13 order in this proceeding. We have repeatedly affirmed our finding that the level of competition for gathering is not material to the Commission's decision whether to allow

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[8] *See, e.g., Mid Louisiana Gas Co.* and *Fairbanks Gathering Co.*, 67 F.E.R.C. (CCH) ¶ 61,255 at 61,853 (1994).

[9] *See, e.g., Mid Louisiana Gas Co.* and *Fairbanks Gathering Co.*, 69 F.E.R.C. (CCH) ¶ 61,303 (1994); *Arkla Gathering Services Co.*, 67 F.E.R.C. (CCH) ¶ 61,257, *reh'g* 69 F.E.R.C. (CCH) ¶ 61,280 (1994).

a pipeline to abandon its gathering facilities. For the same reasons, we affirm our denial of Indicated Shippers' request for an evidentiary hearing on the grounds that the record was not complete as to the issue of competition.

We also will deny the Undersigned Parties' rehearing request that the Commission hold an evidentiary hearing or a technical conference on the issue of the net book value of the transferred facilities. They raise no specific objection to the value applied by El Paso and point to no miscalculation in El Paso's accounting of the net book value of the facilities.

3. *Priority of Service Under the Default Contract*

The Commission intends the default contract to insure that Field Services will provide gathering service that is consistent with El Paso's existing service and that the default contract provisions will not so burden a shipper that, as a practical matter, its service has been arbitrarily terminated. El Paso maintains that the default contract provides for the default shippers to receive from Field Services service of the same priority as the service they currently have with El Paso, since all of El Paso's existing gathering contracts are for interruptible service.

The nominal interruptibility of an El Paso customer's existing gathering services for its firm transportation shippers is meaningless since gathering priority is actually controlled by whether a customer's transportation contract is firm or interruptible. El Paso is correct that Field Services cannot continue El Paso's practice of tying gathering service priority to transportation service priority. However, the default contract's imposition of a lower priority on a default shipper's service if the shipper does not dedicate all of its gas to gathering by Field Services does not comply with the Commission's service

consistency requirement or the requirement that the default contract meet the default shippers' reasonable expectations regarding service. The quality of service a customer receives prior to Field Services' acquisition of El Paso's gathering facilities must remain the same under the default contract. For these reasons, we will deny El Paso's request for rehearing on the issue of priority of service under the default contract.

4. *Ignacio*

Indicated Shippers' argument that Field Services will be providing interstate transportation service to Ignacio on a non-jurisdictional basis in violation of the NGA is without merit. Once El Paso abandons its gathering system by transfer to Field Services, the system will no longer be operated by a natural gas company subject to the Commission's jurisdiction but by a non-jurisdictional gathering company. Further, the service Field Services will provide for Ignacio will not be jurisdictional. The entire service will be provided in a production area through Field Services' facilities which, we have determined, primarily perform a gathering function. The incidental delivery to an LDC prior to delivery into interstate transportation is not inconsistent with that function and does not require certification under the NGA. The gas will be delivered by Field Services to Ignacio in the production area prior to commingling in the facilities of an interstate pipeline and, following delivery to Ignacio's local distribution system, all of the gas will be consumed in the state of production. No regulatory gap will be created and the contract between Field Services and Ignacio will have no effect on the cost of service to out-of-state customers.[10]

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[10] *Cf., City of Farmington v. FERC*, 829 F.2d 1308 (D.C. Cir. 1987) (finding no FERC jurisdiction over producer's sale to end-user even though the gas was commingled in producer's gathering facilities with gas destined to be sold by the producer in interstate commerce).

There thus is no basis for continued jurisdiction over the service to Ignacio upon El Paso's abandonment and Field Services acquisition of the facilities.

Contrary to Indicated Shippers' argument, an agreement between Field Services and Ignacio will have no effect on the jurisdictional status of service to Ignacio. Rather, it serves as a precondition to our approval of El Paso's abandonment of the facilities it uses to serve Ignacio. Once the facilities and service are abandoned and turned over to Field Services, a non-jurisdictional entity, the Commission no longer has jurisdiction over the facilities or the service, as discussed above.

We also disagree with Indicated Shippers' further argument that it is unduly discriminatory for the Commission to condition El Paso's abandonment upon a mutually agreeable service agreement between Field Services and Ignacio, but provide only the default contract to protect El Paso's gathering customers. In general, the Commission has found that discrimination is undue when there is a difference in rates or service among similarly situated customers that is not justified by some legitimate factor.[11] The different requirement for Ignacio does not meet the threshold test for undue discrimination since Ignacio and the gathering customers are not similarly situated -- Ignacio currently receives certificated transportation service, not gathering service, from El Paso. Further, the Commission's regulations prohibit El Paso from unilaterally abandoning Ignacio's jurisdictional transportation service.

Indicated Shippers also argue that the default contract is insufficient protection for the gathering customers. As we have

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[11] *See* Order No. 436, F.E.R.C. Stats. & Regs. ¶ 30,655 at 31,541 (1985).

stated in similar cases, the default contract is only meant to be a transitional vehicle.[12]

V. *El Paso's Request for Clarification*

We will deny El Paso's request for clarification on the issue of service to Ignacio. The September 13 order conditioned the abandonment on an executed contract between Field Services and Ignacio providing for service to Ignacio. The reference in the order to the alternative of El Paso's filing a revised default contract providing for firm service to Ignacio was inadvertent. However, we note that on November 17, 1995, El Paso filed a letter informing the Commission that Field Services and Ignacio executed an agreement that will supersede Ignacio's current service agreement with El Paso as of the effective date of the facility transfer and provide continuous, uninterrupted service. Once El Paso files the executed contract with the Commission, it will have met the abandonment condition.

The Commission orders:

The requests for clarification and rehearing are denied.

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[12] *See, e.g., Arkla*, 71 F.E.R.C. (CCH) ¶ 61,297 (1995); *Mid Louisiana*, 69 F.E.R.C. (CCH) ¶ 61,303 (1994).

APPENDIX D

TITLE 15. COMMERCE AND TRADE
CHAPTER 15B. NATURAL GAS

15 U.S.C. § 717 (1996)

§ 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest

As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) Intrastate transactions exempt from provisions of chapter; certification from State commission as conclusive evidence

The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

(d) Vehicular natural gas jurisdiction

The provisions of this chapter shall not apply to any person solely by reason of, or with respect to, any sale or transportation of vehicular natural gas if such person is --

(1) not otherwise a natural-gas company; or

(2) subject primarily to regulation by a State commission, whether or not such State commission has, or is exercising, jurisdiction over the sale, sale for resale, or transportation of vehicular natural gas.

APPENDIX E

TITLE 15. COMMERCE AND TRADE
CHAPTER 15B. NATURAL GAS

15 U.S.C. § 717c (1996)

§ 717c. Rates and charges

(a) Just and reasonable rates and charges

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Filing of rates and charges with Commission; public inspection of schedules

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Changes in rates and charges; notice to Commission

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Authority of Commission to hold hearings concerning new schedule of rates

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or

charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

APPENDIX F

TITLE 15. COMMERCE AND TRADE
CHAPTER 15B. NATURAL GAS

15 U.S.C. § 717d (1996)

§ 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

APPENDIX G

TITLE 15. COMMERCE AND TRADE
CHAPTER 15B. NATURAL GAS

15 U.S.C. § 717f (1996)

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7,

1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of --

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served

upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) Determination of service area; jurisdiction of transportation to ultimate consumers

(1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

(g) Certificate of public convenience and necessity for service of area already being served

Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) Right of eminent domain for construction of pipelines, etc.

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is

situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

APPENDIX H

Excerpts from the Commissioners' discussion of issues remanded by the D.C. Circuit in *Conoco, Inc. v. FERC*, 90 F.3d 536 (D.C. Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 1017 (1997) (*NorAm Gas Transmission Co.*, Docket Nos. CP94-628 and RP95-94)

(From Capitol Connection's Broadcast of the Federal Energy Regulatory Commission's Open Meeting on March 12, 1997)

Commissioner Massey:

> "We noted that our historical approach had created an expectation, relied on by the producing community, that their ability to receive service at a reasonable rate would continue in a regulated environment . . . . While stating that the Commission had not adequately explained why states would not be able to protect NorAm's customers, the court noted that regulatory gap arguments had found favor in Supreme Court authority . . . . I would encourage the states to take a hard look at whether their regulatory regimes are sufficient to address possible market power abuses by a gatherer . . . . I think it's up to the states now to step up to the plate and to look at their gathering policies -- what protections are they affording to producers who need access to these systems. We look to them now to take up the mantle and we've discussed this issue at this table before . . . . The states need to step up to the plate and take a close look at their regulatory policies with respect to gathering."

Commissioner Hoecker:

> "Certainly I hope very strongly that states have taken the opportunity to take a serious look at this, which is essentially a matter of protecting small business, and in the future, given the doubt cast upon our authority to provide for these kinds of transitional mechanisms, it will be more important for states to be effective and conscientious in this area."

Commissioner Bailey:

> "I do and I will agree that it is an area the states should evaluate and I look at their interest in regulating and I know that my state colleagues will be very diligent in doing so."

Commissioner Santa:

> "[T]he states are much closer to the situation as to what is happening in the producing sector and I do think that they have the ability to deal with it within the context of their legislatures and their regulatory process and that we ought to leave it to them to do so."

Chair Moler:

> "I said when we first adopted the *NorAm* case and particularly in light of *Conoco*, that really the states are the appropriate place for this issue to be addressed. I continue to believe that and hope they will do so."

FILED

(2) 96184-7 JUL 21 1997

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

The State of New Mexico Energy, Minerals and Natural Resources Department, The Commissioner for Public Lands for the State of New Mexico, Pacific Gas & Electric Company, and Southern California Gas Company,
Petitioners,

v.

Federal Energy Regulatory Commission,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For The Fifth Circuit

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BRIEF OF RESPONDENT EL PASO NATURAL GAS COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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July 21, 1997

18 pgs

QUESTION PRESENTED

Whether the Court of Appeals correctly held the Federal Energy Regulatory Commission adopted a permissible interpretation of the Natural Gas Act, which expressly excludes the "gathering of natural gas" from the Commission's jurisdiction, when it ruled that El Paso Field Services Company ("Field Services"), a corporation engaged solely in gathering and not in jurisdictional sales or transportation, would not be subject to regulation under the Act.

PARTIES TO THE PROCEEDINGS

Respondent El Paso Natural Gas Company ("El Paso") is a corporation organized and existing under the laws of the State of Delaware. El Paso has the following non-wholly owned subsidiaries and affiliates:

Altamont Gas Transmission Co.
Border Gas Inc.
Compania Samalayuca II, S.A. de C.V. (Mexico)
Cornerstone/Merit Joint Venture
Deepsea Ventures, Inc.
El Paso Energy Mexico S.A. de C.V. (Mexico)
Energy Equity EPIC (SengKang) Pty. Ltd. (Australia)
EPEC East Natural Gas L.P.
EPEC Midwest Natural Gas L.P.
EPED Aguaytia Co. (Cayman Islands)
Epic Energy Pty. Ltd. (Australia)
Epic Energy Australia Pty. Ltd. (Australia)
Epic Energy Queensland Pty. Ltd. (Australia)
Epic Energy South Australia Pty. Ltd. (Australia)
Epic Energy Operations and Maintenance Pty. Ltd. (Australia)
EPIC Gas Transportes S.A. (Chile)
EPIC Samalayuca A, L.L.C.
EPIC Samalayuca B, L.L.C.
EPIC Yucatan Pipeline Co. (Cayman Islands)
The F and E Oyster Partnership
Garvin County Pipeline
Gas de Chile S.A. (Chile)
Gasoduco Transandino S.A. (Chile)
Greater Houston Small Business Equity Fund, Inc.
GreyStar Corp.
H.T. Gathering Co.

Marlin do Brasil Perfuacoes Maritimas Ltda. (Brazil)
MASSPOWER
MESBIC Financial Corp. of Houston
Metroplex Pipeline Co. L.L.C.
Mountain Creek Joint Venture
The Oasis Company
Oletha Partners
Oletha Pipeline I, Ltd.
Oletha Pipeline II, Ltd.
Orange Cogeneration L.P.
Orange Cogeneration GP II, Inc.
Overthrust Pipeline Co.
Pasotronica, S.A. de C.V. (Mexico)
Polk Power GP II, Inc.
Polk Power Partners, L.P.
PT Energy SengKang (Indonesia)
Salawesi Energy Pty. Ltd. (Australia)
SAM II Equity Funding, L.L.C.
Samalayuca Holding Partnership.
Tellepsen Pipeline Services Co.
Tembec Co
Valley Pipeline L.L.C.
The Western Market Center Joint Venture
Wielkopulska Energia S.A. (Poland)

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No. 96-1847

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1996

The State of New Mexico Energy, Minerals and Natural Resources Department, The Commissioner for Public Lands for the State of New Mexico, Pacific Gas & Electric Company, and Southern California Gas Company,
Petitioners,

v.

Federal Energy Regulatory Commission,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For The Fifth Circuit

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BRIEF OF RESPONDENT EL PASO NATURAL GAS COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTORY PROVISIONS INVOLVED

In addition to the provisions of the Natural Gas Act ("NGA" or "Act"), 15 U.S.C. §§ 717-717w, selected by the Petitioners at pages 2-3 of the Petition, this case involves Section 1(b) of the Act, 15 U.S.C. § 717(b), which provides, in pertinent part:

> The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale . . . and to natural-gas companies engaged in such transportation or sale, but shall not apply to . . . the production or gathering of natural gas.

STATEMENT OF THE CASE

Although natural gas moves in a continuous flow from the wells where it is produced to the burnertips where it is consumed, the natural gas industry consists of a number of different segments. As presently structured, the principal segments are: (1) gas exploration and production; (2) gas gathering, which involves the process of collecting gas produced at individual wells and moving such gas through a series of pipes to a processing plant or other central point; (3) marketing, either to end users, distributors, or other marketers; (4) transportation performed by interstate and/or intrastate pipelines; and (5) local distribution to end users. Interstate transportation is regulated by the Federal Energy Regulatory Commission (the "Commission" or "FERC") pursuant to the NGA, while local distribution and, in some states, intrastate transportation are regulated by the various states.

In general, gathering can be performed by a gas producer (or its affiliate), by a gathering company not affiliated with either a producer or a pipeline, by an interstate pipeline, or by an affiliate of an interstate pipeline solely engaged in gathering (referred to herein as an "affiliated gatherer"). According to a recent Commission order, approximately 70 percent of gathering in the U.S. is performed by independent gatherers, that is, companies that are not interstate pipelines or affiliated gatherers. *Arkla Gathering Services Co.*, 69 FERC ¶ 61,280, at 62,090 (1994). As the court below found, there is "no question that FERC does not have the authority to regulate" (and in fact does not regulate) gathering performed by independent gatherers. *Pacific Gas & Electric Co. v. FERC*, 106 F.3d 1190, 1196 (5th Cir. 1997) ("*PG&E*"). The question addressed in the orders and opinion below is whether, despite the express exemption of Section 1(b), the Commission has jurisdiction over affiliated gatherers such as Field Services.

Historically, interstate pipelines provided a "bundled" sales service which included, in the sales price, all costs associated with getting the gas from the wellhead to the pipeline's customers, including the costs of the gas itself, gathering the gas, and then transporting it to customers. In 1992, however, the Commission issued Order No. 636,[1] which required, among other things, that all interstate pipelines "unbundle" their services by offering each service separately. Thus, some pipelines began to provide a stand alone gathering

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[1] Order No. 636, 57 Fed. Reg. 13,267 (1992), *on reh'g*, Order No. 636-A, 57 Fed. Reg. 36,128 (1992), *on reh'g*, Order No. 636-B, 57 Fed. Reg. 57,911 (1992), *reh'g denied*, 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part, United Distrib. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996) (per curiam), *cert. denied*, __ U.S. __, 117 S. Ct. 1123 (1997).

service that was separate from both their sales service and their transportation service. In response to the Commission's unbundling policy, in 1994 El Paso sought Commission authorization to abandon certain of its gathering facilities and convey them to Field Services, which would not be subject to the jurisdiction of the Commission and therefore could compete on even terms with independent gathering companies.[2/]

In 1995, the Commission authorized the abandonment and ruled that it "does not have jurisdiction over companies such as Field Services that perform only a gathering function." *El Paso Natural Gas Co.*, 72 FERC ¶ 61,220, at 62,014 (1995), *reh'g denied*, 73 FERC ¶ 61,224 (1995). The Court of Appeals for the Fifth Circuit, adopting a rationale substantially identical to that in a recent D.C. Circuit opinion addressing the same issue, upheld the Commission's determination. Petition, Appendix A at 11-12.

2/ Most of El Paso's gathering facilities had never been constructed pursuant to certificates of public convenience and necessity under the Commission's NGA Section 7 authority, 15 U.S.C. § 717f, and thus did not require Commission abandonment authorization to be transferred to Field Services. *See El Paso Natural Gas Co.*, 72 FERC ¶ 61,220, at 62,004 (1995). The gathering facilities that required abandonment authorization either had once been certificated but no longer constituted gathering facilities under current legal tests, or were constructed in connection with projects that were certificated without differentiating between jurisdictional transportation and non-jurisdictional gathering facilities. 72 FERC at 62,004.

REASONS FOR DENYING THE WRIT

The Court should deny the Petition because the decision below is consistent with the language of the NGA and the prior decisions of this Court and does not present an important federal question which should be settled by this Court.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT AND REACHES THE SAME RESULT AS A RECENT RULING BY THE D.C. CIRCUIT

Petitioners first contend that the decision below conflicts with *Northern Natural Gas Co. v. FERC*, 929 F.2d 1261 (8th Cir. 1991). *Northern*, however, involved an issue not presented here and, thus, there is no split between circuits. In *Northern*, the court held that, notwithstanding Section 1(b), the Commission had jurisdiction to regulate an *interstate pipeline's* gathering rates by virtue of the "in connection with" language of Section's 4 and 5. 929 F.2d at 1273. In a footnote, the *Northern* Court also volunteered the opinion that gathering facilities owned by a pipeline include facilities owned or operated by an "affiliate, subsidiary, or lessor[]" of the pipeline. 929 F.2d at 1263 n.2. This footnote is clearly *dictum*, however. It is beyond reasonable dispute, and Petitioners do not contend otherwise, that the only question at issue in *Northern* was whether the Commission could regulate gathering rates charged by an *interstate pipeline*. The instant case involves the gathering rates of an affiliated gatherer not of an interstate pipeline. Thus, there is no conflict between the Fifth Circuit's opinion below and the holding of *Northern*.

Instead of conflict, there is agreement between the two circuits which have addressed the question presented in this case. In *Conoco, Inc. v. FERC*, 90 F.3d 536 (D.C. Cir. 1996) ("*Conoco*"), *cert. denied sub nom., Amoco Trading Corp. v. FERC*, ___ U.S. ___, 117 S. Ct. 1017 (Feb. 18, 1997), the D.C. Circuit affirmed the Commission's determination that it lacked jurisdiction under the NGA to regulate the gathering rates charged by an affiliated gatherer, employing essentially the same reasoning as the Fifth Circuit did in the instant case. *See* 117 S. Ct. 1017. Both circuits agreed, moreover, that *Northern* did not decide the question at issue here and so is not in conflict with the determination below that the Commission lacks jurisdiction over affiliated gatherers. *Conoco*, 90 F.3d at 546-47; *PG&E*, 106 F.3d at 1196-97.

II. THE COMMISSION'S ORDERS ARE CONSISTENT WITH THE DECISIONS OF THIS COURT INTERPRETING THE NATURAL GAS ACT

In their effort to concoct a legal issue that merits this Court's review, the Petitioners claim that the Fifth Circuit's opinion below directly conflicts with two decisions of this Court: *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581 (1945) ("*CIG*"), and *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682 (1947) ("*Interstate*"). According to the Petitioners, *CIG* and *Interstate* established that gathering rates charged by an affiliated gatherer are rates charged "in connection with" jurisdictional interstate transportation or sales by the interstate pipeline and therefore are subject to the Commission's rate-setting authority. Petition at 15.

The Petitioners' argument is based on a complete misreading of *CIG* and *Interstate*. Contrary to Petitioners'

claims, *CIG* and *Interstate* do not even address the subject of gathering rates, much less "establish" that the Commission has jurisdiction to regulate such rates. At issue in *CIG* was the scope of the Commission's authority over *sales for resale rates* of an interstate pipeline where such rates included, among other things, the cost of gathering natural gas. While observing that "[c]ertainly [Section 1(b)] precludes the Commission from any control over the activity of producing or gathering natural gas,"[3] the Court held that the Commission's jurisdiction over sales for resale rates enabled it to take into account the *costs* of gathering and production in determining the reasonableness of the pipeline's bundled sales rate. The case thus concerned solely the manner in which the Commission could regulate jurisdictional sales for resale rates, a matter directly within the Commission's statutory mandate.[4]

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[3] 324 U.S. at 602-603. That the Court's opinion was meant to exclude rate regulation of gathering is confirmed by the concurring opinion by Justice Jackson, who provided the deciding fifth vote in the Court's 5-4 decision:

> [T]he Act excludes "production or gathering of natural gas" from jurisdiction of the Commission. If the Commission had imposed any direct regulation upon that activity, I would join in holding it to have exceeded its jurisdiction.

324 U.S. at 609.

[4] *See Conoco*, 90 F.3d at 545 (stating that the *CIG* holding "expressly depended upon the company's jurisdictional sales, however; the case does not stand for the proposition that the Commission can regulate the rates charged by any gatherer.").

Petitioners have misstated the holding of *Interstate* in a similar fashion. In that case, the Court upheld the FPC's determination that it could regulate an interstate pipeline company's *sales for resale* in the state where the sales gas was produced. 331 U.S. at 687. Like *CIG*, therefore, *Interstate* involved the sales for resale rates of an interstate pipeline, not the gathering rates of an affiliated gatherer.

In sum, the Fifth Circuit's opinion is fully consistent with this Court's holdings in *CIG* and *Interstate*.

III. THE FIFTH CIRCUIT CORRECTLY HELD THAT THE FERC ADOPTED A PERMISSIBLE INTERPRETATION OF THE NATURAL GAS ACT

Lastly, Petitioners argue this case presents an important federal question in that it gives the Court the opportunity to clarify the "*Chevron*" doctrine.[2] While Petitioners offer several reasons why, in their view, the Fifth Circuit *misapplied Chevron*, they completely fail to explain or provide any justification for their claim that the *Chevron* doctrine itself requires clarification by the Court. Thus, their assertion that this case presents an important federal question requiring review by this Court is demonstrably without merit.

In fact, even the claim that the Fifth Circuit misapplied *Chevron* when it concluded that the Commission adopted a permissible interpretation of the NGA is in error. Petitioners' principal contention is that "the statutory language of Sections 4 and 5 of the NGA, as interpreted by [*CIG*] and

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[2] Petition at 13. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[*Interstate*], unambiguously encompasses gathering functions performed by a gathering affiliate of an interstate pipeline." Petition at 17. As shown above, however, Petitioners' interpretation of *CIG* and *Interstate* is specious, and thus provides no support for Petitioners' *Chevron* argument.

Petitioners further contend that the case should be resolved in their favor in step 1 of the *Chevron* analysis because, they assert, the NGA *unambiguously* requires the Commission to regulate affiliated gatherers by virtue of language in Sections 4 and 5 requiring that rates charged "in connection with" jurisdictional transportation and sales must be just and reasonable. Petition at 17.

In its orders below, however, the Commission explained why Petitioners' interpretation conflicts with the statutory language, and adopted a plainly permissible reading of the statute. As the Commission found, the language relied on by Petitioners governs only the rates charged "by any *natural-gas company* . . . in connection with the transportation or sale of gas subject to the jurisdiction of the Commission. . . ." 15 U.S.C. § 717c(a) (emphasis added); *see also id.* § 717d(a); *El Paso*, 73 FERC at 61,641. The NGA defines a "natural-gas company" as "a person engaged in the *transportation* of natural gas in interstate commerce, or the *sale* in interstate commerce of such gas for resale." 15 U.S.C. § 717a(6) (emphasis added); *see* 73 FERC at 61,641. The Commission reasonably and properly concluded that because affiliated gatherers such as Field Services do not engage in either jurisdictional sales or transportation, they do not constitute natural gas companies for purposes of the NGA. *El Paso*, 73 FERC at 61,641. Accordingly, because the requirements of Sections 4 and 5 apply only to natural gas companies, Field Services and other affiliated gatherers are not

subject to whatever authority the Commission may have under those sections to regulate rates that are charged "in connection with" jurisdictional sales or transportation. *Id.* This conclusion is particularly compelling in light of Section 1(b), which states the Commission does not have authority to regulate gathering. Thus, the Commission clearly adopted a permissible, if not required, interpretation of the NGA, and thus the Fifth Circuit correctly applied *Chevron*.

The foregoing discussion also demonstrates why the Commission did not, as alleged by the Petitioners, "deregulate" an area that the NGA placed within the Commission's jurisdiction. Petitioners cite *MCI Telecomm. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218 (1994), for the proposition that a court may not, under the guise of *Chevron* deference, permit an administrative agency to deregulate an area that Congress has placed by statute within the agency's authority. Petition at 13. *MCI* simply has no application in this case. The Commission did not "deregulate" affiliated gatherers; rather, Congress, by virtue of the statutory language discussed above, never gave the Commission jurisdiction to regulate affiliated gatherers in the first place nor has the Commission ever done so. Accordingly, the Fifth Circuit's opinion does not conflict with *MCI*.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1996

NEW MEXICO ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission correctly determined that it lacks jurisdiction under the Natural Gas Act, 15 U.S.C. 717 *et seq.*, over the natural gas gathering rates charged by a natural gas company's affiliate, when the affiliate performs its gathering services independently of, and at arm's length from, the natural gas company's interstate transportation services.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1847

NEW MEXICO ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 106 F.3d 1190. The opinions of the Federal Energy Regulatory Commission (Pet. App. B1-B66, C1-C12) are reported at 72 F.E.R.C. ¶ 61,220 and 73 F.E.R.C. ¶ 61,224.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1997. The petition for a writ of certiorari was filed on May 20, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 1(b) of the Natural Gas Act of 1938 (NGA or Act), 15 U.S.C. 717(b), states that the provisions of the Act "shall apply to the transportation of natural gas in interstate commerce, * * * the sale in interstate commerce of natural gas for resale, * * * and * * * natural gas companies engaged in such transportation or sale," but not to the "production or gathering of natural gas." "Gathering" is the "process of collecting gas at the point of production (the wellhead) and moving it to a collection point for further movement through a pipeline's principal transmission system." *Northern Natural Gas Co.* v. *FERC*, 929 F.2d 1261, 1265 (8th Cir.), cert. denied, 502 U.S. 856 (1991). There is no bright-line test for determining whether an activity constitutes interstate transportation, which falls within the jurisdiction of the NGA, or gathering, which does not. The Federal Energy Regulatory Commission (Commission or FERC) makes that determination on a case-by-case basis, applying a "primary function" test. See *Amerada Hess Corp.*, 52 F.E.R.C. ¶ 61,268 (1990).[1]

Sections 4 and 5 of the NGA, 15 U.S.C. 717c, 717d, require the Commission to establish for "natural gas compan[ies]"— *i.e.*, persons or corporations "engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas

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[1] The "primary function" test involves consideration of various factors: (1) the length and diameter of the pipelines; (2) the extension of the facility beyond the central point in the field; (3) the pipelines' geographic configuration; (4) the location of compressors and processing plants; (5) the location of wells along all or part of the facility; and (6) the operating pressure of the pipelines. See, *e.g.*, Pet. App. B22-B29.

for resale," 15 U.S.C. 717a(6)—"just and reasonable rates" for, or in connection with, "the transportation or sale of natural gas subject to the jurisdiction of the Commission." 15 U.S.C. 717c(a), 717d(a). Section 4(c) requires natural gas companies to file their rates with the Commission, 15 U.S.C. 717c(c), and Sections 4(e) and 5(a) authorize the Commission to determine the lawfulness of any such rates or changes in rates, 15 U.S.C. 717c(e), 717d(a).

Section 7(c) of the Act, 15 U.S.C. 717f(c), prohibits construction of a facility for "transportation or sale of natural gas, subject to the jurisdiction of the Commission," unless the Commission has issued a "certificate of public convenience and necessity" for that facility. In turn, Section 7(b), 15 U.S.C. 717f(b), prohibits a natural gas company from abandoning "facilities subject to the jurisdiction of the Commission or any service rendered by means of such facilities," unless the Commission has found "that the present or future public convenience or necessity permit such abandonment."

b. Traditionally, interstate pipelines operated primarily as gas merchants, buying gas at the wellhead and selling it either to local distribution companies for resale or directly to end-users. Under that regime, pipelines charged a single "bundled" rate for both the gas sold and its transportation to the purchaser. In regulating the rate that the pipeline could charge for the sale of gas, the Commission had jurisdiction to consider the costs of production or gathering that were embedded in the pipeline's sales rates. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 677 (1954); *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 601-604 (1945).

In 1992, after implementing a series of orders to foster a more competitive marketplace for natural gas, the Commission issued Order No. 636,[2] which required pipelines to unbundle their sales and transportation rates. Under Order No. 636, a pipeline generally may act only as a transporter once gas has left the production area and entered the pipeline's mainline systems. See 18 C.F.R. 284.8(a)(1), 284.9(a)(1) (1995). Pursuant to its rate authority under Sections 4 and 5 of the Act, the Commission continues to require pipelines that provide gathering services to file their gathering rates. See *Northern Natural*, 929 F.2d at 1265 (Commission has jurisdiction over gathering rates where pipeline itself performs the gathering "in connection with" interstate transportation).[3] In several recent decisions, however, the Commission determined that it lacks jurisdiction over the gathering rates of a pipeline affiliate that operates independently of the pipeline itself and performs no interstate sales or transportation services.[4] The D.C. Circuit recently affirmed

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[2] 57 Fed. Reg. 13,267, on reh'g, Order No. 636-A, 57 Fed. Reg. 36,128 (1992), aff'd in part and remanded in part *sub nom. United Distrib. Cos.* v. *FERC*, 88 F.3d 1105 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 1723, 1724 (1997), on remand, Order No. 636-C, 78 F.E.R.C. ¶ 61,186 (1997).

[3] The Eighth Circuit observed in *Northern Natural* that "[p]ermitting a pipeline to manipulate the otherwise unregulated charges for gathering services performed over its own facilities in connection with jurisdictional interstate transportation, would, in effect, permit the *pipeline* to establish rates for the interstate transportation." 929 F.2d at 1270.

[4] See, *e.g.*, *Mid Louisiana Gas Co.*, 67 F.E.R.C. ¶ 61,255, order on reh'g, 69 F.E.R.C. ¶ 61,303 (1994); *Williams Natural Gas Co.*, 67 F.E.R.C. ¶ 61,252 (1994); *Northern Natural Gas*

that determination in *Conoco Inc.* v. *FERC*, 90 F.3d 536 (1996) (affirming *Arkla Gathering Services Co.*, 67 F.E.R.C. ¶ 61,257, on reh'g, 69 F.E.R.C. ¶ 61,280 (1994), on reh'g, 71 F.E.R.C. ¶ 61,297 (1995)), cert. denied, 117 S.Ct. 1017 (1997).

2. El Paso Natural Gas Company (El Paso), an interstate natural gas company, proposed to transfer its natural gas gathering facilities and services to El Paso Field Services Company (El Paso Field), its corporate affiliate, which would then assume responsibility for providing gas gathering services. On January 14, 1994, El Paso sought from the Commission authority under Section 7(b) of the Act to abandon the gas gathering facilities—which, while exempt under Section 1(b), nevertheless had been the subject of a certificate of public convenience under Section 7(c)—and to convey those facilities to El Paso Field, which would then assume responsibility for providing gas gathering services. Petitioners, local natural gas distributors and two state regulatory entities, filed protests with the Commission. They contended, among other things, that the Commission was without authority to disclaim jurisdiction over El Paso Field's gathering rates and services.

The Commission determined that the subject facilities were "gathering facilities" within the meaning of Section 1(b). The Commission further determined that El Paso Field, as a provider of services using those gathering facilities (and as a provider of no other services involving interstate transportation or sales), would not be a "natural gas company" subject to regulation under the NGA so

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Co., 69 F.E.R.C. ¶ 61,264 (1994); *K N Energy, Inc.*, 69 F.E.R.C. ¶ 61,377 (1994).

long as it operates its gathering services independently of, and at arm's length from, El Paso's transportation services.[5] The Commission denied petitioners' request to investigate the extent of competition for gathering services in the relevant geographic areas:

> [T]he existence or absence of competition for gathering in an area is irrelevant to whether or not the Commission will regulate an affiliated gatherer's rates. Under the NGA, the Commission has no authority to regulate a gatherer's rates or its terms and conditions since a gatherer is not a natural gas company.

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[5] To ensure that the relationship remains at arm's length, the Commission directed El Paso to amend its tariff to add the following standards of conduct:

> (a) El Paso will provide nondiscriminatory access to all sources of supply in accordance with Part 284 of the Commission's regulations and will not give shippers of its gathering affiliate undue preference over shippers of nonaffiliated gatherers or other customers in scheduling, transportation, storage or curtailment priority.
>
> (b) El Paso will not condition or tie its agreement to provide transportation service to an agreement by the producer, customer, end-user, or shipper relating to any service by any gathering affiliate, any services by it on behalf of its gathering affiliate, or any services in which its gathering affiliate is involved.

Pet. App. B35. The Commission further directed El Paso to offer gathering-service customers a *pro forma*, or default, contract for gathering services at reasonable rates and terms for a reasonable period of time after transfer of the facilities out of NGA jurisdiction. *Id.* at B17-B18; see also *id.* at B40-B43.

Pet. App. B33. The Commission added, however, that it may disregard corporate form and treat a pipeline and its affiliate as a single entity if the "affiliated gatherer acts in concert with its pipeline affiliate * * * in a manner that frustrates the Commission's effective regulation of the interstate pipeline." *Id.* at B35-B36.

On rehearing, the Commission specifically distinguished its disclaimer of jurisdiction over El Paso Field's gathering rates from its assertion of jurisdiction over the gathering rates charged by the natural gas company in *Northern Natural*. Pet. App. C7-C8. It pointed out that, while *Northern Natural* involved gathering performed directly by a natural gas company "in connection with" the pipeline's jurisdictional transportation services within the meaning of Sections 4 and 5, this case involved gathering to be performed by an affiliate. The Commission explained that a company (such as El Paso Field) "that neither transports natural gas in interstate commerce, nor makes jurisdictional sales, is not a natural-gas company under the NGA, and thus does not * * * provide gathering services in connection with jurisdictional transportation." *Id.* at C7. The Commission again noted its authority to disregard corporate form and to exert control over the gathering activities of an affiliated gatherer in cases involving "abuses arising specifically from the interrelationship between the pipeline and its affiliate." *Id.* at C8, citing *Mid Louisiana Gas Co.*, 67 F.E.R.C. ¶ 61,255, at 61,853 (1994); *Arkla Gathering Services Co., supra.*

3. "[C]hoos[ing] to follow the D.C. Circuit's lead" in *Conoco Inc.* v. *FERC*, 90 F.3d 536 (1996), cert. denied, 117 S. Ct. 1017 (1997) (see Pet. App. A13), the court of appeals affirmed. After first determining

that petitioners have standing to challenge the Commission's decision, see *id.* at A5-A10, the court held that the NGA, which does not explicitly address the question of affiliated gatherers, "allows FERC to treat [El Paso Field] on its own terms and not as a company that provides transportation or sales 'in connection with' jurisdictional activities." *Id.* at A12. Although the court recognized that, as a policy matter, "[t]here is room to question whether the formality of creating a separate corporate entity justifies turning a heavily regulated gathering facility into a facility that is outside of FERC jurisdiction," it agreed with the D.C. Circuit that FERC's interpretation of the NGA "is a permissible interpretation of the statute" and is therefore entitled to judicial deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See Pet. App. A11-A13. Like the D.C. Circuit, the court perceived no conflict between the Commission's position and the Eighth Circuit's decision in *Northern Natural*. That case, the court observed, involved FERC's jurisdiction to regulate the gathering rates not of affiliated gatherers, but of interstate pipelines that were themselves engaged in gathering, a "fact [that] makes all the difference." *Id.* at A11 (citing *Conoco*, 90 F.3d at 541, 547).

The court of appeals also rejected petitioners' challenge to the Commission's "fail[ure] to consider whether competition was sufficient to warrant granting El Paso's abandonment request." Pet App. A12-A13. The court explained that the Commission had taken "steps to maintain competition by requiring open-access and default contracts and threatening to re-assert its jurisdiction if [El Paso Field] should act discriminatorily," and concluded that "[t]he statute

does not require a more specific inquiry into the state of competition." *Id.* at A13 (citing *United Distrib. Cos.* v. *FERC*, 88 F.3d 1105, 1134-1142 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 1723, 1724 (1997)).

ARGUMENT

The court of appeals correctly affirmed the Commission's conclusion that its rate jurisdiction under Sections 4 and 5 of the NGA does not extend to gathering services operated by a non-"natural gas company" affiliate of an interstate pipeline, where the gathering services are performed independently of, and at arm's length from, the pipeline's interstate sales and transportation services. This Court recently denied a petition for a writ of certiorari to review the only other court of appeals decision to have addressed that issue, *Conoco Inc.* v. *FERC*, 90 F.3d 536 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 1017 (1997) (No. 96-686), and this case is no more worthy of the Court's review.

Petitioners argue (Pet. 11-22) that Section 4 of the NGA requires the Commission to regulate rates for gathering services performed by an interstate pipeline's affiliate, and that the Commission's decision here amounts to *de facto* deregulation of interstate pipeline gathering rates. That argument is without merit. Section 4(a) applies, by its terms, only to "rates and charges * * * received by [a] natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission." 15 U.S.C. 717c(a). Under Section 2(6) of the Act, 15 U.S.C. 717a(6), "'[n]atural-gas company' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." El

Paso Field performs no interstate transportation or sales, but only gathering services, which Section 1(b) specifically exempts from the Commission's jurisdiction. 15 U.S.C. 717(b) (NGA provisions "shall not apply * * * to the production or gathering of natural gas"). Accordingly, under the plain language of the Act, El Paso Field is not subject to the Commission's rate regulation; in any event, the Commission's interpretation of the Act is plainly reasonable. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).

Despite petitioners' contrary argument (Pet. 14-16), neither *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 601-604 (1945), nor *Interstate Natural Gas Co.* v. *FPC*, 331 U.S. 682 (1947), nor *Northern Natural Gas Co.* v. *FERC*, 929 F.2d 1261, 1265 (8th Cir.), cert. denied, 502 U.S. 856 (1991), involved the Commission's jurisdiction *vel non* to regulate a non-natural gas company, like El Paso Field, that independently performs only gathering services. As the D.C. Circuit recognized in *Conoco*, see 90 F.3d at 545 & n.19, see also Pet. App. A11, those cases involved the quite different issue of the Commission's authority to regulate the reasonableness of rates charged by "natural gas companies" that directly engaged in gathering or production "in connection with" their interstate transportation or sale in interstate commerce for resale.[6]

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[6] In *Colorado Interstate*, the Commission and the Court viewed the companies involved as operating as a single enterprise or integrated system for rate-setting purposes. See 324 U.S. at 585, 596-597. Similarly, in *Interstate Natural Gas*, the pipeline, although an affiliate of another natural gas company, performed both interstate transportation and gathering. See 331 U.S. at 684-686. Finally, although the *Northern Natural*

Thus, in disclaiming jurisdiction over El Paso Field, the Commission has not, as petitioners charge, rewritten this Court's jurisdictional boundaries (Pet. 16) or abdicated its regulatory responsibilities under the NGA (Pet. 22). The Commission has correctly recognized that its jurisdiction is limited to "natural gas companies" as defined by the Act, and that a company, like El Paso Field, "that neither transports natural gas in interstate commerce, nor makes jurisdictional sales, is not a natural-gas company under the NGA." Pet. App. C7. Moreover, the Commission specifically predicated its jurisdictional ruling on El Paso's operation of its jurisdictional services independently of and at arm's length from El Paso Field. If the pipeline and its affiliate violate that standard

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court stated in dictum that the expression "gathering facilities owned by the pipeline" includes "such facilities owned or operated directly or indirectly by a pipeline or its * * * affiliate," 929 F.2d at 1263 n.2, that case involved the Commission's jurisdiction to regulate gathering services performed directly by a natural gas company, and the Eighth Circuit held only that the Commission may regulate the rates a natural gas company itself charges for gathering services performed "in connection with" jurisdictional interstate transportation.

Petitioners' reliance (Pet. 13, 16-17) on *MCI Telecomm. Corp.* v. *AT&T*, 512 U.S. 218 (1994), and *Maislin Indus. U.S.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), is also misplaced. In the former case, this Court held that a provision of the Communications Act permitting the Federal Communications Commission to "modify" a statutory requirement did not permit the FCC to eliminate the requirement altogether; in the latter, the Court held that the "filed rate doctrine" of the Interstate Commerce Act foreclosed the Interstate Commerce Commission's policy of relieving a shipper of the obligation to pay a rate filed with the ICC when the shipper and carrier had privately negotiated a lower rate. Neither of those holdings has relevance to the issue presented here.

and collude so as to effect a jurisdictional service that falls within the Commission's jurisdiction, the Commission is prepared to disregard their separate corporate structures and to treat the pipeline and the gatherer as a single entity. *Id.* at B35-B36. In short, the Commission has carefully tailored its order to ensure that the affiliated status of the pipeline and the gatherer cannot be abused to frustrate the Commission's effective regulation of "the transportation of natural gas in interstate commerce." *Id.* at B35.

Finally, petitioners claim that the Commission's "refusal to consider competition in its grant of abandonment to El Paso" violates its obligation, under Section 7(b) of the NGA,[7] to consider whether "the present or future public convenience or necessity permit[s] such abandonment." Pet. 20. Whether or not the Commission has jurisdiction to consider whether an abandonment is in the public interest when the recipient of abandoned gathering facilities is a nonjurisdictional entity, cf. Pet. App. A12-13, the court of appeals correctly determined that, in this case, the Commission had reasonably met any obligation it might have under Section 7(b) to ensure that the abandonment does in fact serve the public

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[7] Section 7(b) provides:

> No natural-gas company shall abandon all or any portion of its facilities *subject to the jurisdiction of the Commission*, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

15 U.S.C. 717f(b) (emphasis added).

interest. Specifically, the Commission "did consider antitrust problems that could arise from El Paso's spin-off of its gathering facilities and took steps to maintain competition by requiring open access and default contracts and threatening to re-assert its jurisdiction if [El Paso Field] should act discriminatorily." *Id.* at A13. As the court of appeals concluded, "[t]he statute does not require a more specific inquiry into the state of competition." *Ibid.*; see also *Consolidated Edison Co.* v. *FERC*, 823 F.2d 630, 636 (D.C. Cir. 1987) ("[B]y delegating abandonment power in such broad terms, Congress expected that the Commission would develop an appropriate test to fit the regulatory climate.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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